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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

VINCENT MANCUSI,

Petitioner,

vs.

AKIL AL-JUNDI, a/k/a Herbert Scott Deane; BIG BLACK, a/k/a Frank Smith; ELIZABETH DURHAM, Mother and Legal Representative of Allen Durham, deceased; LITHO LUNDY, Mother and Legal Representative of Charles Lundy, deceased; THERESA HICKS, Widow and Legal Representative of Thomas Hicks, deceased; ALICE McNEIL, Mother and Legal Representative of Lorenzo McNeil, deceased; MARIA SANTOS, Mother and Legal Representative of Santiago Santos, deceased; LAVERN BARKLEY, Mother and Legal Representative of L.D. Barkley, deceased; JOMO JOKA OMOWALE, a/k/a Eric Thompson; VERNON LAFRANQUE; ALFRED PLUMMER; HERBERT X. BLYDEN; JOSEPH LITTLE; ROBIN PALMER; GEORGE "CHE" NIEVES; JAMES B. "RED" MURPHY; THOMAS LOUK; PETER BUTLER; CHARLES "FLIP" CROWLEY; WILLIAM MAYNARD, JR.; CALVIN HUDSON; KIMANTHI MPINGO, a/k/a Edward Dingle; KENDU HAIKU, a/k/a Willie Stokes; OOJI KWESI SEKOU, a/k/a Chris Reed; PHILLIP "WALD" SHIELDS; JEROME ROSENBERG; ALPHONSO ROSS; FRANK LOTT; GARY RICHARD SUMPTER; OMAR SEKOU TOURE, a/k/a Otis McGaughey; DACAJEWEIAH, a/k/a John Hill; and JOHNNIE BARNES, as Administrator of the goods, chattels and credits which were of John Barnes, deceased, on behalf of themselves and all others similarly situated,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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July 5, 1991

QUESTIONS PRESENTED

1. Is there a constitutional due process limitation on the period of permissible delay in bringing civil cases to trial which, at this time, 20 years after the alleged events, bars the trial of this 42 U.S.C. §1983 class action by Attica inmates against the former Superintendent, Mr. Vincent Mancusi?

2. Does the Court's inherent power to protect societal interests in the just, speedy and inexpensive determination of all civil actions in the Federal Courts warrant the dismissal of this case where the principal defense witnesses have died during the period of delay?

3. Did the Second Circuit erroneously limit the intended scope of this Court's holding in *Whitley v. Albers*, 475 U.S. 312 (1986), by denying Defendant Mancusi the protection of qualified immunity?

List of Parties

Petitioner:

Vincent R. Mancusi – Mr. Mancusi was Superintendent of Attica Correctional Facility during the Attica rebellion on September 13, 1971.

Respondents:

Plaintiffs – Plaintiffs are a class designated by the District Court as all inmates in D-Yard on September 13, 1971 (App. p. A-35).

Other defendants:

The Estate of Major Monahan -- Major Monahan was in charge of the State Troopers and correction officers who carried out the assault to retake the prison and return the prisoners to their cells.

The Estate of Russell G. Oswald – Mr. Oswald was Commissioner of Corrections in charge of the New York State Prison System on September 13, 1971. Governor Rockefeller appointed him in charge of putting down the Attica rebellion.

Karl Pfeil – Mr. Pfeil was defendant Mancusi's Deputy Superintendent at the Attica Correctional Facility at the time of the rebellion.

Additional Defendants in the District Court Proceedings:

The Estate of Nelson A. Rockefeller – Governor Rockefeller personally ordered the retaking of the prison and put Commissioner Oswald in charge. On motion for summary judgment, affirmed by the Court of Appeals, *Al-Jundi v. Estate of Rockefeller*, 885 F.2d 1060 (2d Cir. 1989), the action against the Estate of Rockefeller was dismissed on the grounds of qualified immunity.

Walter Dunbar – Mr. Dunbar was Executive Deputy Commissioner of the Department of Correctional Services and assisted Commissioner Oswald during the Attica rebellion. He has died and his estate has not been substituted.

Major General John C. Baker – General Baker was Commander of the National Guard of the State of New York and Chief of Staff to the Governor. The National Guard, under General Baker's command, was charged with supplying the necessary supportive medical care. The Complaint was dismissed against General Baker for plaintiffs' failure to answer interrogatories.

Other Named Defendants:

Other defendants named in the full title, as it appears in the District Court's Order of June 26, 1990 denying Petitioner's motion for summary judgment of dismissal, who neither have been joined nor have participated in the proceedings below are:

T. Norman Hurd, Director of State Operations of the State of New York;

Wim Van Eekeren, Deputy Commissioner of Department of Correctional Services of the State of New York;

A.C. O'Hara, Commissioner of the Office of General Services of the State of New York;

John C. Miller, Chief Inspector of the Division of State Police of the State of New York;

Leon Vincent, Deputy Superintendent of Attica Correctional Facility under Superintendent Mancusi;

Robert F. Fischer, Special Deputy State Attorney General in charge of Attica prosecutions; and

Dalton Carney, Sheriff of Wyoming County, New York, the county where the Attica Correctional Facility is located.

The following officers and members of the New York State Police not served by the plaintiffs nor made parties to the action but named in the title and described in Paragraph 33 of the Complaint as State Police officers who "participated in and/or failed to take steps to prevent the acts complained of" include: Henry Williams; J.C. Moochler; A.T. Malovich; Robert P. Quick; W.L. Shurter; K.E. Gellert; G.K. Elbert; T.N. Kruk; W. K. Dillon; M. K. Halloran; K.S. Crouse; R. J. Dwyer; P.P. Zelinski; G.R. Toray; J.B. Connell; B. Muthig; D. O. Parr; J. J. Patterson; J.W. McCarthy; D.O. Ellis; and E.M. Byre.

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION OF THE DEFENDANT VINCENT R. MANCUSI FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Defendant Vincent R. Mancusi Petitions for Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The Second Circuit Opinion is reported as *Al-Jundi v. Estate of Rockefeller, et, al.*, Nos. 90-2287, -2289, -2291 (2d Cir. 1991), (Appendix pages A-1-A-12) (Appendix page hereinafter App. p.). The Order of the Second Circuit dated April 18, 1991, denying Petition for Reargument and Hearing *En Banc* is submitted herewith (App. pp. A-13-A-14).

The Decision and Memorandum of the District Court, which was the subject of the appeal to the Second Circuit and other decisions and memorandum of the District Court denying motions to dismiss, are:

1. U.S. District Court Order for plaintiffs to show cause why the case should not be dismissed for failure to prosecute dated July 8, 1980 (App. pp. A-15-A-17).

2. U.S. District Court Order granting conditional dismissal and decertification of class dated October 27, 1980 (App. pp. A-18-A-25).

3. U.S. District Court Order denying defendant Mancusi's motion to dismiss for failure to prosecute dated May 15, 1981 (App. pp. A-26-A-32).

4. U.S. District Court Order denying defendant Mancusi's motion to dismiss or to decertify the class dated April 2, 1987 (App. pp. A-33-A-41).

5. U.S. District Court Order denying defendants' motion for summary judgment dated June 26, 1990 (App. pp. A-42-A-54).

JURISDICTION

On February 27, 1991, the Second Circuit issued an opinion affirming the decision of the United States District Court for the Western District of New York which had denied Petitioner's motion for dismissal, and on April 18, 1991, entered an order denying Petitioner's motion for rehearing and argument *en banc*. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The statutory basis for federal jurisdiction is 42 U.S.C. §1983.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

I. Constitutional Provisions:

— U.S. Const. Amend. V. . . . . App. at 381

— U.S. Const. Amend. VIII . . . . . App. at 381

II. United States Statutes & Rules:

— 42 U.S.C. §1983 . . . . . App. at 380

— 28 U.S.C. §1254(1) . . . . . App. at 380

— 28 U.S.C. §2072 . . . . . App. at 380

— Fed. R. Civ. P. 1 . . . . . App. at 382

— Fed. R. Civ. P. 41(b) . . . . . App. at 382

STATEMENT OF THE CASE

A detailed statement of the facts addressing the circumstances surrounding the Attica rebellion in 1971 are set forth in *Inmates of Attica Correctional Facility v. Rockefeller II*, 477 F.2d 375 (2d Cir. 1973). The material facts necessary for the consideration of the questions presented relate principally to the 17 year delay in bringing this case to trial and do not require a statement of the specific events surrounding the rebellion.

The delay began with the filing of the Complaint on September 13, 1974, three years after the Attica rebellion and the day of the expiration of the Statute of Limitations. *Inmates of the Attica Correctional Facility et al. v. Rockefeller I*, 453 F.2d 12, 13 (1971). The case has dragged on for 17 years ever since. Four attempts in the District Court to obtain a dismissal on behalf of the Petitioner for failure to prosecute or denial of due process have all failed (App. pp. A-16-A-17; A-55-A-63; A-64-A-95; A-151-A-187).

In the sixth year of litigation, on June 13, 1980, the District Court *sua sponte* issued an Order to Show Cause why the action should not be dismissed for failure to prosecute (App. pp. A-16-A-17). A conditional order of dismissal was entered on October 27, 1980 (App. pp. A-18-A-25), however, no dismissal was ordered when the plaintiffs agreed to the substitution of new plaintiffs' counsel and notices were issued to depose the principal defense witnesses and obtain documents (App. pp. A-26-A-31). None of the depositions were scheduled or taken nor have been to this date.

In the seventh year of litigation, on March 24, 1981, the plaintiffs having failed to go forward with any discovery, Petitioner Mancusi and the other defendants moved to dismiss for failure to prosecute (App. pp. A-55-A-63). The motion was denied by the District Court but no scheduling order for depositions or other discovery was entered (App. pp. A-26-A-32).

In the twelfth year of litigation, after four other federal court 42 U.S.C. §1983 ("§1983") actions had been filed naming

Superintendent Mancusi as a defendant had all been concluded,[1] Petitioner again moved for dismissal on January 13, 1986, on the additional grounds that, "requiring defendant Mancusi to defend against the same and additional charges, now 14 years after the event, constitutes a denial of due process" (App. pp. A-64-A-95). Again, the motion for dismissal, after a period of more than a year *sub judice*, was denied by the District Court on April 2, 1987 (App. p. A-359).

In the sixteenth year of litigation, on March 21, 1990, Petitioner Mancusi again moved for summary judgment of dismissal on the grounds of denial of due process and the additional grounds of qualified immunity (App. pp. A-157-A-187). As additional grounds, Mancusi cited Governor Carey's Proclamation of December 30, 1976, terminating, in the interest of justice, all further criminal prosecutions arising out of the Attica rebellion (App. pp. A-93-A-95), and the Second Circuit's dismissal in favor of the Estate of Nelson A. Rockefeller on the grounds of qualified immunity (App. p. A-363). Nonetheless, the District Court again, on June 26, 1990, denied Petitioner Mancusi's motion for summary judgment and dismissal (App. pp. A-42-A-54).

Finally, in the seventeenth year of litigation, on February 27, 1991, the Second Circuit declined to exercise its discretionary pendant appellate jurisdiction and again rejected Petitioner's due process argument and remanded the case for a prompt trial[2] (App. pp. A-1-A-12). The present Petition has followed.

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[1] These cases, *Inmates of Attica Correctional Facility v. Rockefeller I*, 453 F.2d 12 (2d Cir. 1971); *Inmates of Attica Correctional Facility v. Rockefeller II*, 477 F.2d 375 (2d Cir. 1973); *Nieves v. Oswald*, 498 F.2d 802 (2d Cir. 1974); and *U.S. ex rel. Walker v. Mancusi*, 338 F.Supp. 311 (W.D.N.Y. 1971), *aff'd*, 467 F.2d 51 (2d Cir. 1972), were all cited on both of Petitioner's due process motions to dismiss but none squarely met the requirement of *Res Judicata* or Collateral Estoppel imposed by the District Court.

[2] As suggested in Petitioner's motion for reargument (App. pp. A-262-A-275), trial has not turned out to be so prompt. It is presently set for September 30, 1991, but the District Court has rejected plaintiffs' first Pre-Trial Statement and for the second time ordered one which properly identifies witnesses and documents. Plaintiffs are also still engaged with the Estates of Oswald and Monahan on various motions.

Following the lead of *Barker v. Wingo*, 407 U.S. 514 (1972), this record of delay compels the conclusion that the due process criteria for requiring just, speedy and inexpensive trials of civil actions warrants the granting of this Petition.

REASONS FOR GRANTING THE WRIT

I

THE EXTRAORDINARY 20 YEAR DELAY IN THIS CASE COMPELS THE CONCLUSION THAT THE CONSTITUTIONAL DUE PROCESS LIMITATION ON DELAY IN BRINGING A CIVIL CASE TO TRIAL AND SOCIETAL INTERESTS REQUIRE DISMISSAL

In 1972, this Court in *Barker v. Wingo*, 407 U.S. 514 (1972) considered the constitutional limitation on delay permitted under the Sixth Amendment requirement for speedy trial in criminal cases. That decision led to the Speedy Trial Act of 1974 adopted by Congress two years later. The first question presented by this Petition is whether the time has now come for this Court to address the constitutional due process limitation under the Fifth Amendment for the trial of civil cases. Since the adoption of The Federal Rules of Civil Procedure, all civil cases tried in the federal courts have been under the injunction of Rule 1. "These Rules govern . . . all suits of a civil nature. . . . They shall be construed to secure the just, speedy and inexpensive determination of every action." Fed.R.Civ.P. 1.[3]

The "societal interest in providing a speedy trial" which Justice Powell relied upon in *Barker* has not yet been considered by this Court in applying a due process limitation to the period of delay which constitutes a denial of a just and speedy trial to a civil litigant. 407 U.S. at 519. This Court, in *Link v. Wabash Railroad Co.*, 370 U.S. 626 (1962), affirmed the District Court's dismissal under Rule 41(b) for failure to prosecute a six year old case. The present case reaches beyond the discretionary power of Rule

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[3] A nationwide Harris opinion poll of state and federal civil trial judges reported on the civil justice system and concluded, in contrast with 17 years in the present case, it takes a typical civil damage suit from the time it is first filed, on an average, 14 months to reach trial. Harris & Associates, *Judges Opinions on Procedural Issues Conducted for Aetna Life & Casualty*, at 14, Table 2.8 (Oct.-Dec. 1987). Abuse of discovery is the most serious cause for delay in the federal courts. *Id.* at 34, Table 4.3. Seventy-five percent of federal court judges believe that in "high stakes" cases, costs were excessive. *Id.* at 91.

41(b). The extraordinary delay, death of principal witnesses, prior litigation and the Governor's proclamation terminating all criminal proceedings raise constitutional due process grounds sufficient for dismissal of this civil action.

In *Barker*, the delay in bringing the defendant to trial was four years. In the present civil case, the delay has been 17 years. As Justice Powell pointed out in *Barker*, "in addition to the general concern that all accused persons be treated according to decent and fair procedures, there is a societal interest in providing a speedy trial which exists separate from, and at times in opposition to, the interests of the accused." 407 U.S. at 519. Seventeen years of delay in the present case, which arises from the notorious Attica rebellion, gives rise to the same compelling societal interest. Delay of this magnitude in a case of nationwide interest brings into question the very functioning of the judicial system and its ability to justly determine civil suits between parties who seek justice in the federal courts.

The consequences of such delay have been well publicized.[4] They border on a national disgrace.[5] One case which occupies the federal courts for 17 years may deny scores, if not hundreds, of other cases the opportunity to be heard and decided. The

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[4] "For a lot of people, justice delayed is justice denied." Wall St. J., December 3, 1987, (reporting on the Virginia Federal Court's "Rocket Docket"); "People often care less about how much money they get than the process by which they get it." A.B.A.J., July 1, 1988 at 29, excerpts from Tyler, *What is Procedural Justice Used by Citizens to Assess the Fairness of Legal Procedures*, L. & Soc. Rev. at 301-335 (1988) (Thomas R. Tyler, American Bar Foundation researcher, also authored *Social Psychology of Procedural Justice* (Plenum 1988)); "The public is increasingly restless and unwilling to accept delays." *Justice Delayed, Justice Denied*, President's Page, Mich. B.J. at 1012 (Oct. 1985).

[5] In the 1981-82 Annual Report to the Board of Overseers, Derek C. Bok, Harvard University Past President, addressing "A Flawed System", concluded that "most people find their legal rights severely compromised by the long and frustrating delays involved in bringing procedures to a conclusion. From afar, therefore, the legal system looks grossly inequitable and ineffective." The President's Report 1981-82 at 2 (Harvard Press 1982).

same backlog of criminal cases which threatened a breakdown of the trial of the accused persons in *Barker v. Wingo* now threatens all civil litigation.

Judicial time, perhaps the most precious element for the disposition of civil litigation, is grossly squandered by any case which labors through 17 years of litigation and does not reach trial until 20 years after the event. The 356 entries on the docket sheet of the present action provide ample evidence of the squandering of court time. Among these entries are 96 motions in the District Court, two appeals to the Circuit Court and pretrial motions and discovery that are still pending. A measure of the cost of the delays is found in the Estate of Rockefeller's claim against the State of New York for legal fees in the amount of $1,082,296.50. 205 N.Y.L.J. 43 (1991).

Recently, this Court in *Edmonson v. Leesville Concrete Co., Inc.*, 59 U.S.L.W. 4574 (June 4, 1991), held that societal interests in protecting the impartiality of the voir dire in criminal cases extends to civil actions and that "harms recognized are not limited to the criminal sphere. A civil proceeding often implicates significant rights and interests." 59 U.S.L.W. at 4578. Indeed, at times, delay in bringing a civil proceeding to trial harms the defendant no less than delay in a criminal trial. In either case, delay causes the accused person to be deprived of the very thing promised to him upon entry into the judicial system, the right to a speedy and just trial.

As decided in *Edmonson*, the Due Process Clause of the Fifth Amendment applies in civil actions, and violations by participants in the litigation may compose a constitutional violation. *Edmonson* established that "governmental authority may dominate an activity to such an extent that its participants must be deemed to act with the authority of the government and, as a result, be subject to constitutional restraints." 59 U.S.L.W. at 4576, citing *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 172 (1972). The Court went on to hold that when "private litigants participate in the [judicial process] they serve an important function within the government and act with its substantial

assistance. . . . [They] represent a unique government function delegated to private litigants by the government and attributable to the government for purposes of invoking constitutional protections." 59 U.S.L.W. at 4578. To be certain, plaintiffs here acted with substantial assistance of the District Court as illustrated by the more than 350 entries on the docket sheet. The injury to the defendant is the "direct result of government delegation and participation." *Id.* In fact, the damage caused by the delay "is made more severe because the government permits it to occur within the courthouse itself." *Id.* As the docket sheet reflects, motions were *sub judice* with the District Court an astonishing seven years. Contribution to delay of this magnitude by a lifetime appointed Federal Judge more than meets the state action requirement. Mr. Mancusi and society are damaged by this egregious delay in the very place "where the law itself unfolds." *Id.*

Mr. Mancusi gained unwanted notoriety for being Superintendent of the Attica Correctional Facility at the time when the Nation's attention was focused on the discord occurring at the Prison. Once again, the Nation's attention is focused on the name "Attica," not because of any activity at the prison, but rather because of the lack of activity and attention the plaintiffs and the District Court have given to this litigation. This case continues to attract the local and national news media. To force this litigation to trial would certainly "cast doubt on the integrity of the judicial process." 59 U.S.L.W. at 4578, quoting *Rose v. Mitchell*, 443 U.S. 545, 556 (1979). In addition, it is clear that such delay in the "courtroom raises serious questions as to the fairness of the proceedings conducted there." 59 U.S.L.W. at 4578. If members of our society are expected to continue to accept, trust and rely on the judicial system, they must have complete assurance that it is working as it should work. To bring this case to trial, 20 years after the event, would make society think, to use the words selected by Justice Brennan, "[t]he law is a[n] ass." *In re Sawyer*, 360 U.S. 622, 634 (1959), quoting C. Dickens, *Oliver Twist*, 377 (1912).

Edmonson began the development of extending vital constitutional protection from criminal to civil cases. The Petitioner

urges this Court to continue this development by extending the *Barker* constitutional requirements for a speedy trial in criminal matters to civil cases where unprecedented delay and the death of most of the critical witnesses has made a just trial no longer possible.

This further extension of criminal due process to civil litigation naturally flows from "the fundamental requirement of due process [which is] the opportunity to be heard 'at a meaningful time and in a meaningful manner.' " *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976).

II

A JUST TRIAL OF THIS CIVIL ACTION, 20 YEARS AFTER THE ATTICA REBELLION, IS NO LONGER POSSIBLE

Delay, as Justice Powell pointed out in *Barker*, can work two ways, to prejudice or to assist the accused. 407 U.S. at 521. The same is true in civil litigation. Delay in meritorious civil actions postpones and often seriously prejudices the plaintiff's right to receive the relief or damages to which he is entitled. But it is also true that delay, particularly in an unmeritorious case, can severely prejudice the defendant. As the litigation drags on and the costs continue to mount, the merits of the case fade and the compulsion to settle increases. At some point it becomes cheaper to pay the plaintiff than the lawyer and the case settles. It is not possible to say how many of the 95% of the civil actions filed in the federal courts settle on this basis, as opposed to going to trial. However, it can hardly be denied in the present case that where legal costs for one of the defendants have reached the proportion of the Rockefeller Estate's claim amounting to $1,082,296.50, enormous pressures have developed to reach a settlement. Disposition of this action on such a basis can hardly meet the requirement of the just trial to which the Petitioner is entitled.

Even more important, as Justice Powell pointed out in *Barker*, "[a]s the time between . . . [the event] and the trial lengthens, witnesses become unavailable or their memories may fade." 407 U.S. at 521. In the present case, notwithstanding 17 years of litigation, the plaintiffs, whether by design or inattention, have not taken a single deposition. All of the principal witnesses with the exception of the Petitioner, Superintendent Mancusi, and his Second Deputy, Karl Pfeil, have now died or become unavailable.

Although certainly not binding on this Court, the Second Circuit in *Tradeways Inc. v. Chrysler Corp.*, 342 F.2d 350 (2d Cir. 1965), held the death of one witness during a five year delay warranted dismissal. In fact, the Second Circuit said it was an abuse of the District Court's discretion not to dismiss the case.

342 F.2d at 352. In the present case, not only one, but five critical witnesses have died during the 17 year delay. Consider the impact on Petitioner Mancusi's defense and the impossibility of obtaining a just trial at this time.

Governor Rockefeller — The Governor approved and authorized the retaking by force. He put Commissioner Oswald in overall charge and Major Monahan of the State Police in charge of the forceful retaking. *Attica: The Official Report of the New York State Special Commission on Attica* 319, 333 (1972). The Governor was in constant telephone communication with Attica throughout Saturday, Sunday and Monday, the day of the retaking. *Id.* at 319. The Governor was given an eyewitness description over the telephone of what was happening during this period. *Id.* Governor Rockefeller is dead. The claim against his estate has been dismissed (App. p. A-363).

Russell G. Oswald — Mr. Oswald was Commissioner of the Department of Correctional Services of the State of New York of which the Attica Correctional Facility was only a part. He was the senior corrections official on the scene. *Attica: The Official Report of the New York State Special Commission on Attica* 215-216. He had been placed in direct charge of putting down the rebellion and was Petitioner Mancusi's immediate superior. *Id.* at 319. He is also now dead, having died a few days after receiving news of the Second Circuit's decision denying him the protection of qualified immunity. A motion is currently pending in the District Court to substitute his estate (App. pp. A-373-A-374).

Walter Dunbar — Mr. Dunbar was Executive Deputy Commissioner of the Department of Correctional Services of the State of New York. 453 F.2d at 15. As Mr. Oswald's Deputy, he was in the prison during the retaking and the return of prisoners to their cells, which occurred under the direction of Major Monahan. *Attica: The Official Report of the New York State Special Commission on Attica* 20, 446. He is now dead. His estate has not been made a party to the action.

Wim Van Eekeren — Mr. Van Eekeren was Deputy Commissioner for Programs at the Department of Correctional Services under Oswald. *Id.* at xxxv. He was present at the scene during the events of the rebellion. His right arm and leg are

paralyzed from a stroke and he requires a brace to walk. He was never properly served or made a party to the action.

John C. Miller – Inspector Miller was Chief Inspector of the Division of State Police and the top ranking State Police officer. *Id.* at 215. He is now dead. His estate has not been substituted as a party.

John Monahan – Major Monahan was Commander of Troop A of the New York State Police, Batavia, New York. *Id.* at 188. He and the men under his command were ordered by Oswald to retake the prison and return the prisoners to their cells. *Id.* at 329, 330, 333. He and his men were in control of D-Yard where the rebellion was subdued and A-Yard where the prisoners were strip-searched and allegedly brutalized while being returned to their cells in the final phase of the retaking. Major Monahan is dead. His no-asset estate has been substituted as a defendant in this action (App. p. 371).

Major General John C. Baker – General Baker was Commander of the National Guard of the State of New York and Chief of Staff to defendant Rockefeller. *Attica: The Official Report of the New York State Special Commission on Attica* 342. He was responsible for the backup emergency medical care during the retaking. *Id.* at 421, 422. Upon the failure of the plaintiffs to answer his interrogatories, his Motion for Summary Judgment was "granted" and the complaint against him dismissed more than 10 years ago (App. pp. 338, 339). He has had several strokes and is no longer able to testify.

A.C. O'Hara – General O'Hara was the Commissioner of the Office of General Services of the State of New York. *Attica: The Official Report of the New York State Special Commission on Attica* at xxxiii. He is dead and his estate has not been made a party.

All other defendants – The other named defendants either were not made parties to the action or have subsequently been dismissed as parties.

It may be suggested by those unfamiliar with the practicalities of civil litigation that this unavailability of witnesses is of Petitioner Mancusi's own making as much as of the plaintiffs. Such is not the case. In the first place, as Justice Powell observed, "A

defendant has no duty to bring himself to trial." *Barker*, 407 U.S. at 527. The same is true for civil litigation. Many civil cases are filed, few are chosen for trial. In the overwhelming percentage of cases, it is not in the defendant's interest to spend his money and his attorney's efforts forcing the plaintiffs to prepare and prosecute a claim against himself.

This was particularly so for the Petitioner, Superintendent Mancusi. By any measure, he was a remote and minor defendant. He had every right to assume that the principal defendants, protecting the deep pockets of Governor Rockefeller's Estate, were entitled to control the litigation and that the disposition of plaintiffs' claim against the Rockefeller Estate would terminate the litigation. When counsel for the Rockefeller Estate requested the Petitioner and other defendants not to join in the Estate's application for qualified immunity on the basis that it might jeopardize the success of that application, counsel for the other defendants wisely concurred in the belief that success of the Estate of Rockefeller would in all likelihood end the matter.

Whether right or wrong in this analysis, it is doubtful, even if the effort were made, that counsel for the Petitioner Mancusi could have succeeded in expediting this trial in the face of the exhaustive documentary discovery insisted upon by the plaintiffs and the delays occasioned by the principal parties and the District Court. The Petitioner did all he could to expedite or end this case by moving for dismissal four times, each effort proving unsuccessful.

The question remains to consider, with whom the responsibility for the delay in this case lies. As a practical matter, delay seldom springs from the action or neglect of a single party. It grows out of the combined interaction of all parties and the Court. The test on defendant's motion to dismiss for delay, introduced by *Barker* and more recently framed by *United States v. Taylor*, 487 U.S. 326 (1988), is whether the defendant himself was the principal cause for the delay. Applying that test to the present case, there can be little doubt that the principal cause for delay rests with the plaintiffs and the District Court not the defendant, Mr. Mancusi. The plaintiffs did not bring suit until three years after the events described in the Complaint. It was

four years after the event before the present amended complaint was framed. For four more years, while the District Court had the defendants' original motion for dismissal *sub judice*, the plaintiffs did nothing to expedite the Court's decision. Plaintiffs allowed their appeal from the District Court's Order granting the motion to dismiss in part to lapse for failure to comply with the Second Circuit's Appeals Management Plan. Six years and five months elapsed from the filing of the Complaint until the filing of plaintiffs' first deposition notices. Depositions noticed 10 years ago still have not been taken.

During the 17 year period of this litigation, the District Court had various motions *sub judice* for an unconscionable seven years. During this period, plaintiffs' counsel never made a single effort to seek a more prompt disposition by the District Court.

By contrast, the delay by Petitioner and other defendants, if not routine, was minor. Four months were used to answer the Amended Complaint; four months were consumed in defendants' motion for protective order with respect to plaintiffs' discovery notice to admit and Petitioner's responses to plaintiffs' discovery notice to admit. On Petitioner's motion, 135 additional days were granted by the Court to further examine and copy Attica documents. The principal contribution to the delay by Petitioner Mancusi was not these relatively routine delays but the three motions on Petitioner's behalf seeking to dismiss the case, first for failure to prosecute and subsequently on due process and qualified immunity grounds. Efforts to expedite the prosecution of the case or obtain its dismissal can hardly be charged as delay on Petitioner's part.

By contrast to any delay which can be arguably charged against the Petitioner, plaintiffs' delay and that of the District Court are a matter of record and not open to debate. Years were spent in initiating the action and drafting the complaint. An unprecedented six years and five months lapsed before any deposition notices were served, and an unconscionable seven years passed while various motions were *sub judice* with the District Court.

III

THE QUALIFIED IMMUNITY PROTECTION OF *WHITLEY V. ALBERS* EXTENDED TO PETITIONER FOR THE FULL PERIOD OF THE RETAKING UNTIL THE STATE POLICE HAD RETURNED THE PRISONERS TO THEIR CELLS

A prison riot begins when the prisoners break out of their cells and the guards lose control over a portion of the prison. It does not end until the prisoners are returned to their cells and safely locked up. The Second Circuit, perhaps misled by the different captions in the Complaint, "The Assault" and "The Reprisals," erred in limiting the *Whitley v. Albers*, 475 U.S. 312 (1986), doctrine simply to the shooting or "assault" portion of subduing the riot, thereby stripping the State Police and prison officials of the intended protection of *Whitley v. Albers* during the last phase of putting down the rebellion when the prisoners were being returned to their cells. It was during the period when State Troopers and correction officers under the command of Major Monahan were returning the prisoners to their cells that the alleged wrongful acts of reprisals took place.

The failure of the Second Circuit to extend the *Whitley v. Albers* qualified immunity protection to the period when the prisoners were being returned to their cells was critically harmful to Petitioner Mancusi's claim for qualified immunity. At the time the prisoners were being returned to their cells, Commissioner Oswald was in overall charge of putting down the rebellion, *Attica: The Official Report of the New York State Special Commission on Attica* 215-216, and Major Monahan was in charge of the State Troopers and correction officers who were carrying out the retaking. *Id.* at 329, 330, 333. Superintendent Mancusi was at his desk in the Administration Building where he had been ordered to stay and handle telephone messages. *Id* at 444-445. The Administration Building was outside the prison itself and from his office Superintendent Mancusi could not see any part of D-Yard where the alleged assault on the prisoners was carried out or A-Yard where the prisoners were strip-searched and returned to their cells. *Id.* at 22, 433.

Mr. Mancusi's affidavit in this respect is fully supported by the McKay Commission.[6] After interviewing over 2170 witnesses, including 270 State Police who participated and had direct knowledge of the riot, 100 sheriffs, undersheriffs and deputies who were inside the prison walls, 200 National Guardsmen, Commissioner Oswald, Deputy Commissioner Dunbar, General Baker, the Governor and his staff as well as 1600 other inmates, the McKay Commission reported its findings. *Id.* at xxvi-xxxiv. It determined that "whether ordered to or not, Superintendent Mancusi remained at his desk throughout the day." *Id.* at 444-445. If this finding of the McKay Commission is accepted, there can be no basis for finding "unnecessary and wanton infliction of pain" or a "culpable state of mind" on the part of Petitioner Mancusi. *See, Estelle v. Gamble*, 429 U.S. 97 (1976); *Gregg v. Georgia*, 428 U.S. 153 (1976) (joint opinion); *See also, Wilson v. Seiter*, 59 U.S.L.W. 4671 (June 18, 1991). Without such a finding, there was no basis for denying Superintendent Mancusi the protection of qualified immunity.

Faced with this difficulty on Petitioner Mancusi's motion for dismissal on the grounds of qualified immunity, which also included a renewal of his prior motion to dismiss on due process grounds, plaintiffs' counsel sought out additional evidence in an effort to create an issue of fact. After the motion for summary judgment had been set for argument, plaintiffs' counsel went to two of their own clients who were at the time still incarcerated in other New York State prisons, and obtained affidavits in attempt to rebut the finding of the McKay Commission. The two page-and-one-half affidavits notarized by plaintiffs' counsel state that the two prisoners saw Superintendent Mancusi on the catwalk inside the prison observing the alleged reprisals while the prisoners were being returned to their cells.

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[6] The Commission, headed by the Dean of New York University School of Law, was formed by Governor Rockefeller to investigate and report on all aspects of the Attica rebellion. Its report, *Attica: The Official Report of the New York State Special Commission on Attica*, a bound volume of 555 pages, is the definitive work on the subject.

These Victory and Rosenberg affidavits were the first and only evidence offered by any person or contained in any document attempting to show that Superintendent Mancusi had any knowledge of the reprisals (App. pp. A-188-A-206, A-375-A-379 *see also*, Opinion of Federal District Court Judge John T. Curtin (App. p. A-232)). They were prepared 19 years after the events in a desperate effort to create an issue of fact and to defeat Petitioner Mancusi's motion.[7] The original signed affidavits were not even filed until after argument of the motion.

In the Second Circuit, Petitioner Mancusi unsuccessfully argued these affidavits were unworthy of belief and insufficient to raise an issue of fact to defeat the motion as a matter of law because:

(i) The page and a half of plain assertions of events 19 years ago containing no significant details are directly contrary to the exhaustive, impartial McKay Commission investigation and conclusion which was based on interviews with more than 2170 eyewitnesses immediately following the rebellion.

(ii) The affidavits were taken by plaintiffs' counsel of their own clients, each of whom is seeking to recover $1 million in damages based upon their own naked assertions.

(iii) The affidavits were a desperate attempt to create an issue of fact to avoid the District Court's prior

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[7] Defendant Mancusi moved for summary judgment on the grounds of qualified immunity submitting the required Rule 13 Statement of Uncontroverted Facts on March 21, 1990 (App. pp. A-151-A-187). At a hearing on April 3, 1990, the District Court extended a briefing schedule requiring plaintiffs to file and serve answering papers on April 23, 1990 and setting oral argument on the motion on May 9, 1990 (App. pp. A-366-A-367). Plaintiffs filed their opposition to defendants' motions without the required Rule 13 Statement of Uncontroverted Facts on May 9, 1990, sixteen days past the return date (Dist. Ct. Docket Entry No. 310; *see also*, App. pp. A-199-A-205). One day after the oral argument took place, the Victory and Rosenberg affidavits were filed with the Court, swearing to events for the first time that allegedly occurred almost 20 years before (Dist. Ct. Docket Entry Nos. 311 and 312; *See also*, App. pp. A-375-A-379 (unsigned affidavits)).

ruling and the Second Circuit's decision which had granted qualified immunity to the Estate of Nelson A. Rockefeller.

Since the rendering of the decision by the Second Circuit affirming the denial of Petitioner's motion to dismiss, an additional ground for rejecting the Victory and Rosenberg affidavits has been established. On June 17, 1991, this Court in, *Wilson v. Seiter*, 59 U.S.L.W. 4671, held that in order to defeat the claim of qualified immunity in a §1983 action claiming cruel and unusual punishment, the plaintiffs must show a culpable state of mind on the part of the prison officials. 59 U.S.L.W. 4671 (June 18, 1991). Thus, even considering the highly suspect Victory and Rosenberg affidavits, the requisite elements for an Eighth Amendment violation are not present. *See also*, *Gregg v. Georgia*, 428 U.S. 153 (1976). Admitting, for argument's sake only, the validity of the Victory and Rosenberg affidavits, the plaintiffs have failed to establish or even address a vital element of an Eighth Amendment violation – culpable state of mind by Mr. Mancusi.

The last minute Victory and Rosenberg affidavits, like those submitted in *Lujan v. National Wildlife Federation*, 110 S. Ct. 3177 (1990) fail to show "those specific facts that are necessary to support the claim." Id at 3189. Even if taken as true, the incredible claim of a party plaintiff in contradiction to the McKay Commission remains insufficient. The "culpable state of mind" on the part of Petitioner Mancusi remains unproven. As the Court in *Lujan* pointed out, last minute affidavits are insufficient under *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), to defeat a motion for summary judgment. 110 S. Ct. at 3188. "[T]he plain language of Rule 56(c) mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case." 110 S. Ct. at 3186, quoting *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

Furthermore, as *Lujan* held in reinstating the summary judgment of the District Court, affidavits submitted after the

argument on the motion for summary judgment are untimely and should not have been considered by the Circuit Court. 110 S. Ct. at 3191, 3192. Although not binding on this Court, the court in *Wilson v. Westinghouse Electric Corp.*, 838 F.2d 286 (8th Cir. 1988), observed that such untimely affidavits cannot be used to create an issue of fact on the motion. Allowing such a procedure would mean "no case would ever be appropriate for summary judgment." *Id.* at 289.

CONCLUSION

The harms of delay are not limited to criminal cases. Significant rights and interests of the parties and society at large are also at stake in civil cases.

Fundamental to Petitioner Mancusi's due process right to defend himself is the opportunity to have the case heard and justly determined at a meaningful time and in a meaningful manner.

A trial twenty years after the Attica rebellion, when most of the principal witnesses are dead, does not provide that opportunity.

It is respectfully requested that this Petition be granted.

Dated: July 5, 1991

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91-107

Supreme Court, U.S.
FILED
JUL 17 1991
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

VINCENT MANCUSI,

Petitioner,

vs.

AKIL AL-JUNDI, a/k/a Herbert Scott Deane; BIG BLACK, a/k/a Frank Smith; ELIZABETH DURHAM, Mother and Legal Representative of Allen Durham, deceased; LITHO LUNDY, Mother and Legal Representative of Charles Lundy, deceased; THERESA HICKS, Widow and Legal Representative of Thomas Hicks, deceased; ALICE McNEIL, Mother and Legal Representative of Lorenzo McNeil, deceased; MARIA SANTOS, Mother and Legal Representative of Santiago Santos, deceased; LAVERN BARKLEY, Mother and Legal Representative of L.D. Barkley, deceased; JOMO JOKA OMOWALE, a/k/a Eric Thompson; VERNON LAFRANQUE; ALFRED PLUMMER; HERBERT X. BLYDEN; JOSEPH LITTLE; ROBIN PALMER; GEORGE "CHE" NIEVES; JAMES B. "RED" MURPHY; THOMAS LOUK; PETER BUTLER; CHARLES "FLIP" CROWLEY; WILLIAM MAYNARD, JR.; CALVIN HUDSON; KIMANTHI MPINGO, a/k/a Edward Dingle; KENDU HAIKU, a/k/a Willie Stokes; OOJI KWESI SEKOU, a/k/a Chris Reed; PHILLIP "WALD" SHIELDS; JEROME ROSENBERG; ALPHONSO ROSS; FRANK LOTT; GARY RICHARD SUMPTER; OMAR SEKOU TOURE, a/k/a Otis McGaughey; DACAJEWEIAH, a/k/a John Hill; and JOHNNIE BARNES, as Administrator of the goods, chattels and credits which were of John Barnes, deceased, on behalf of themselves and all others similarly situated,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

APPENDIX

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July 5, 1991

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 686, 687, 688—August Term 1990

Argued: January 10, 1991 Decided: February 27, 1991

Docket Nos. 90-2287, -2289, -2291

AKIL AL-JUNDI, ET AL.,

Plaintiffs-Appellees,

—v.—

VINCENT MANCUSI, KARL PFEIL,
RUSSELL G. OSWALD,

Defendants-Appellants,

THE ESTATE OF NELSON A. ROCKEFELLER, ET AL.,

Defendants.

Before:

KAUFMAN, NEWMAN, and MCLAUGHLIN,
Circuit Judges.

Appeal by corrections officials from the June 26, 1990, order of the District Court for the Western Dis-

trict of New York (John T. Elfvin, Judge) denying motion for summary judgment on grounds of qualified immunity in suit seeking damages for actions occurring during and after the Attica prison riot.

Affirmed in part, reversed in part, and remanded.

JOHN H. STENGER, Buffalo, N.Y. (Kathy R. Lamb, Jaeckle, Fleischmann & Mugel, Buffalo, N.Y., on the brief), *for defendant-appellant Oswald.*

RICHARD E. MOOT, Buffalo, N.Y. (Darryl J. Colosi, Judith M. Bell, Moot & Sprague, Buffalo, N.Y., on the brief), *for defendant-appellant Mancusi.*

IRVING C. MAGHRAN, JR., Buffalo, N.Y. (Mahgran McCarthy & Flynn, Buffalo, N.Y., on the brief), *for defendant-appellant Pfeil.*

ELIZABETH M. FINK, Brooklyn, N.Y. (Dennis Cunningham, Brooklyn, N.Y.; Michael E. Deutsch, Chicago, Ill., on the brief), *for plaintiffs-appellees.*

JON O. NEWMAN, *Circuit Judge*:

The issue on this appeal is whether three senior corrections officials of the State of New York are entitled to avoid trial, on grounds of qualified immunity, in a suit brought by victims of the violence that occurred at

the Attica Correctional Facility in 1971. *See Inmates of Attica Correctional Facility v. Rockefeller*, 453 F.2d 12, 22-24 (2d Cir. 1971) (granting preliminary injunction restraining state officials from engaging in torture, beatings, and other physical abuse). The issue arises on an appeal by Russell G. Oswald, former Corrections Commissioner, Vincent Mancusi, former Superintendent of Attica, and Karl Pfeil, former Assistant Deputy Superintendent of Attica, from the June 26, 1990, order of the District Court for the Western District of New York (John T. Elfvin, Judge) denying their motion seeking summary judgment on grounds of qualified immunity. We affirm in part, reverse in part, and remand for trial.

Background

The background facts underlying the tragic episode with which the name "Attica" is likely to be forever identified are by now familiar. We have set them forth in our early decision upholding preliminary injunction, *Inmates of Attica Correctional Facility v. Rockefeller*, *supra*, and in our more recent decision affirming dismissal of the lawsuit against the estate of former Governor Rockefeller, *Al-Jundi v. Estate of Rockefeller*, 885 F.2d 1060 (2d Cir 1989). It suffices to recall that on September 9, 1971, more than 1,200 inmates at Attica rioted and seized control of portions of the prison, and some of them seized corrections officers as hostages. Some of the seized portions were retaken the same day, but prisoners continued to occupy an area known as D-Yard. On September 13, after negotiations failed, Oswald received permission from the Governor to order the State Police to retake the prison by force. The retaking, organized by the State Police, resulted in the deaths

of ten hostages and twenty-nine prisoners. Afterwards, several prisoners were the victims of brutal reprisals.

The amended complaint, filed in 1975, alleged denials of constitutional rights arising from three phases of the operation: the plan to retake the prison and the implementation of that plan, the brutality inflicted upon the inmates thereafter as reprisals, and the prosecution of inmates for crimes committed during the riot. By the time the qualified immunity defense of the three appellants was submitted for the ruling that is challenged on this appeal, the first portion of the amended complaint had been dismissed against Mancusi and Pfiel, and the third portion had been dismissed against Pfiel. In the immunity ruling, Judge Elfvin dismissed the third portion against Oswald and Mancusi. Thus, what remains for trial are the first portion (the planning) as against Oswald and the second portion (the reprisals) as against all three appellants.[1] Whether qualified immunity was established as a matter of law as to these aspects of the amended complaint is the subject of this appeal.

Discussion

Qualified immunity is available on motion for summary judgment if it appears, from undisputed facts, that an officer's conduct did not violate constitutional rights that were clearly established at the time of his actions, or if it was objectively reasonable for him to believe that his actions did not violate such rights. *See Anderson v.*

1 In addition, the first and second portions of the amended complaint are pending for trial as against the administrator of the estate of John Monahan, formerly a State Police major who planned and led the retaking of the prison. All other defendants have been dismissed for a variety of reasons, many for lack of service.

Creighton, 483 U.S. 635, 638-40 (1987); *Harlow v. Fitzgerald*, 457 U.S. 800, 818-19 (1982); *Robison v. Via*, 821 F.2d 913, 920-21 (2d Cir. 1987). Prisoners' Eighth Amendment right to be free from brutal treatment had been recognized prior to the Attica riot, *see Wright v. McMann*, 387 F.2d 519, 525-26 (2d Cir. 1967). The Supreme Court has more recently cautioned that the "deliberate indifference" standard applicable to prisoners' medical claims does not apply to "making and carrying out decisions involving the use of force to restore order in the face of a prison disturbance." *Whitley v. Albers*. 475 U.S. 312, 320 (1986). In that context, the test is " 'whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.' " *Id.* at 320-21 (quoting *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir.), *cert. denied*, 414 U.S. 1033 (1973)). This more exacting standard is imposed not to foster brutality that results from deliberate indifference but to lessen the risk of harm to both prisoners and prison personnel that might result if those responsible for restoring order in the context of prison riots became hesitant to act promptly and effectively in apprehension of liability too easily imposed.

Since the contours of the Eighth Amendment's protection in the context of a prison riot were not authoritatively delineated until the Supreme Court's 1986 decision in *Albers*, it is arguable that qualified immunity insulates appellants from liability for any consequences of the decision to retake the prison and of the methods used in the course of the retaking. But we do not understand appellants' argument to press so far, and we would not find such an argument persuasive. *Albers* did not recognize "a constitutional right that had not yet

been declared," *see Procunier v. Navarette*, 434 U.S. 555, 565 (1978). Rather, it narrowed the scope of a right previously recognized. Thus, appellants cannot and do not contend that they could not reasonably be expected to know that there were constitutional limits on a prison administrator's response to a prison riot. However, they can and do contend that the standard announced in *Albers* governs this case, and they further assert that they are entitled to immunity because it was objectively reasonable for them to believe that their actions did not violate the constitutional rights of the plaintiffs, as refined in the *Albers* decision.

In assessing this claim, we cannot apply the heightened *Albers* standard indiscriminately to all aspects of the conduct alleged to have been taken or condoned by the appellants during the events at Attica. *Albers* insisted that the "deliberate indifference" standard applicable to many Eighth Amendment claims of prisoners must give way in the prison riot context to the "wanton infliction of pain" standard when evaluating a claim concerning the use of force in retaking a prison. As the Court noted, from such considerations as " 'the need for the application of force, the relationship between the need and the amount of force that was used, [and] the extent of injury inflicted,'. . . inferences may be drawn as to whether the use of force could plausibly have been thought necessary, or instead evinced such wantonness with respect to the unjustified infliction of harm as is tantamount to a knowing willingness that it occur." 475 U.S. at 321 (quoting District Court, 546 F. Supp. 726, 733 (D. Ore. 1982)). The use of force to retake the prison is the essence of the first category of the prisoners' amended complaint, and there can be no doubt that the *Albers* standard applies to all aspects of

the decision to use force in accomplishing the task and in the implementation of that decision. *Albers* does not mean that a prison riot affords prison administrators limitless authority to employ any means, no matter how brutal, to restore order. It does mean that the decision to use force and the extent of force employed are to be assessed, for purposes of asserted Eighth Amendment violations, under the heightened standard of whether injury and pain were wantonly inflicted "for the very purpose of causing harm." However, this heightened standard, framed to assure prompt and effective action to use necessary force to restore order, does not apply to actions of prison officials unrelated to the decisions about whether and how to use force for that purpose. Thus, in this case, we will apply *Albers* faithfully to those aspects of appellants' conduct implicated in the use of force to retake the Attica prison, but we will not go beyond traditional Eighth Amendment standards in assessing, for purposes of qualified immunity, those aspects of their alleged conduct that are fairly separable from decisions regarding the use of force.

Applying this approach, we turn to the first category of the amended complaint, the allegations against Oswald for his alleged role in the plan to retake the prison. Oswald contends, in an argument focusing more on liability than on the defense of immunity, that he bears no responsibility for the adoption and implementation of the retaking plan because the decision to order a retaking was made by Governor Rockefeller and the formulation and implementation of the specific plan for the retaking was the responsibility of Major Monahan of the State Police. If the liability aspects of the claim against Oswald were before us on this limited appeal, which concerns only the immunity defense, we would

doubt that Oswald would be insulated from responsibility for lack of personal involvement. There appears to be sufficient evidence to support findings that he was the senior corrections official on the scene, that he was aware of the retaking plan, and that he had discussed with Monahan at least some of the specific details of the plan.

However, with the exception of the planning for medical care, the deficiencies in the recapture plan alleged by the plaintiffs do not overcome the immunity defense, assessed under the standards of *Albers*. For example, Oswald is faulted because the plan did not include an ultimatum to the prisoners prior to the attack, because he authorized an assault by a large force of armed men even though the prisoners were first subjected to a barrage of CS tear gas, and because he permitted correctional officers to participate as "backup" to the state police despite the extreme hostility the officers bore toward the prisoners as a result of the takeover and the threats to the hostages. Each of these aspects of the plan, even if attributable to Oswald, might be found to constitute negligence, and some might even be found to show deliberate indifference to the likelihood that harm would result. But, after *Albers* that is not sufficient. To establish liability, there must be evidence to show that these aspects of the assault plan were included wantonly for the purpose of inflicting pain, and to overcome the immunity defense, there must be evidence permitting a finding that it was not objectively reasonable for Oswald to believe that the plan did not involve the wanton inflicting of pain. The decision not to issue an ultimatum is precisely the sort of tactical matter on which "neither judge nor jury [may] freely substitute their judgment for that of officials who have made a consid-

ered choice." *Albers*, 475 U.S. at 322. The decision required weighing the enhanced likelihood of surrender against the enhanced likelihood of precipitating action against the hostages and of enabling the prisoners to improve their defense against the assault. Similarly, whether to use 150 men, as Monahan determined to be necessary, or to use fewer, as plaintiffs believe would have been sufficient, is a choice carrying no inference as to the wanton infliction of pain.

Closer to the line is the decision not to preclude the use of corrections officers entirely from the assault, but here again, tactical choices needed to be made; the use of corrections officers, even as backup, posed a risk of aggressive conduct, but the failure to use them posed a risk of prolonging the battle between state police and armed prisoners, with dire consequences for all concerned. In terms of the immunity defense, we conclude that no reasonable jury could find that Oswald did not have objectively reasonable grounds for believing that the decision to retake the prison and the plan for doing so did not involve the wanton infliction of pain. The defense of qualified immunity as to these portions of the complaint must be upheld.

The alleged deficiency in planning for the medical needs of the prisoners stands on a different footing. Once it was decided to retake the prison by force, the duty to make adequate provision for medical needs arose to at least the same extent as it does with respect to the normal operation of a prison. The *Albers* standard applies to the decision to use force and the means selected for implementing that decision, but not to the normal obligations of prison officials to meet the minimal needs of those in their custody. Thus, Oswald can

be found liable if evidence shows that he was deliberately indifferent to the medical needs that could reasonably be expected to arise in the aftermath of the assault. And Oswald can obtain immunity on a motion for summary judgment only if undisputed evidence shows that it was objectively reasonable for him to believe that his conduct, with respect to planning for medical needs, satisfied at least the constitutional standards of *Estelle v. Gamble*, 429 U.S. 97, 104 (1976) (deliberate indifference to serious medical needs is cruel and unusual punishment). *See Martinez v. Mancusi*, 443 F.2d 912 (2d Cir. 1970), *cert. denied*, 401 U.S. 983 (1971) (anticipating standards of *Estelle v. Gamble*). We agree with Judge Elfvin that the evidence of Oswald's lack of attention to planning for medical needs creates jury issues and precludes sustaining, as a matter of law, a qualified immunity defense to this one aspect of the first portion of plaintiffs' allegations.

We turn next to the second portion of the amended complaint, the allegations of condonation of brutal reprisals against the prisoners after the prison was retaken. There is no basis for applying the heightened *Albers* standard to these allegations. The latitude accorded prison officials in deciding when and how to use force to retake a prison from rioting inmates has no application to the summary infliction of brutal punishment once the riot is quelled. As to such conduct, appellants cannot establish an immunity defense on motion for summary judgment if any evidence shows that it was not objectively reasonable for them to believe that they were adhering to the constitutional standards that apply to prison officials in the administration of prison discipline.

The prisoners make no claims that any of the appellants personally participated in the reprisals or directly ordered them to occur. With respect to Oswald, the claim is that he received reports of brutality and must have either observed brutality or deliberately avoided seeing it when he toured the prison about one hour after the assault ended, at a time when hundreds of inmates were allegedly being beaten and brutalized. These allegations find sufficient support in the evidence to withstand a motion for summary judgment on the issue of qualified immunity. With respect to Mancusi and Pfeil, one prisoner has submitted an affidavit that he saw both appellants observing brutal beatings being administered to himself and other prisoners, and the affidavit of another prisoner corroborates this account. Though appellants urge that these affidavits, filed on the eve of trial, are unworthy of belief, that argument is for the jury. Indeed, there is considerable irony in the argument of prison officials, who have in their custody scores of prisoners convicted on the testimony of disreputable criminals, that the testimony of criminals is incredible as a matter of law when it accuses them of unconstitutional conduct.

Appellants' remaining contentions have nothing to do with the defense of qualified immunity, which is the subject of this interlocutory appeal, *see Neu v. Corcoran*, 869 F.2d 662, 664-65 (2d Cir.), *cert. denied*, 110 S. Ct. 66 (1989), and we decline to consider them. However, we do express our concern that this case should be brought to trial at the earliest possible moment. At oral argument counsel for the plaintiffs assured us that they were ready for trial immediately following the disposition of this appeal. We urge the District Court to hold

them to that commitment and to tolerate no delays by the defendants.

The order of the District Court is affirmed in part and reversed in part, and the case is remanded for a prompt trial. The mandate shall issue forthwith.

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term if the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the City of New York, on the eighteenth day of April, one thousand nine hundred and ninety-one.

AKIL AL-JUNDI, also known as Herbert Scott Deane; BIG BLACK, also known as Frank Smith; ELIZABETH DURHAM, Mother and Legal Representative of Allen Durham, deceased; LITHO LUNDY, Mother and Legal Representative of Charles Lundy, deceased; THERESA HICKS, Widow and Legal Representative of Thomas Hicks, deceased; ALICE McNEIL, Mother and Legel Representative of Lorenzo McNeil, deceased; MARIA SANTOS, Mother and Legal Representative of Santiago Santos, deceased; LAVERNE BARKLEY, Mother and Legal Representative of L.D. Barkley, deceased; JOMO JOKA OMOWALE, also known as Eric Thompson; VERNON LAFRANQUE; ALFRED PLUMMER; HERBERT X. BLYDEN; JOSEPH LITTLE; ROBIN PALMER; GEORGE "CHE" NIEVES; JAMES B. "RED" MURPHY; THOMAS LOUK; PETER BUTLER; CALVIN HUDSON; KIMANTHI MPINGO, also known as Edward Dingle; KENDU HAIKU, also known as Willie Stokes; OOJI KWESI SEKOU, also known as Chris Reed; PHILLIP "WALD" SHIELDS; JEROME ROSENBERG; ALPHONSO ROSS; FRANK LOTT; GARY RICHARD SUMPTER; OMAR SEKOU TOURE, also known as Otis McGaughey; DACAJEWEIAH, also known as John Hill; JOHNNIE BARNES, as Administrator of the goods, chattels and credits which were of John Barnes, deceased, on behalf of themselves and all others similarly situated,

Docket No.
90-2287 (L)
-2289
-2291

Plaintiffs-Appellees,

v.

THE ESTATE OF NELSON A. ROCKEFELLER; RUSSELL G. OSWALD; T. NORMAN HURD; WALTER DUNBAR; WM. VAN EEKEREN; JOHN C. MILLER; JOHN MONAHAN; JOHN C. BAKER; A. C. O'HARA; VINCENT; KARL PFEIL; ROBERT F. FISCHER; DALTON CARNEY; WILLIAMS HENRY; J. C. MOOCHLER; A. T. MALOVICH; ROBERT P. QUICK; W. L. SHURTER; K. E. GELLERT; G. K. ELBERT; T. N. KRUK; W. K. DILLON; M. K. HALLORAN; K. S. CROUSE; R. J. DWYER; P. P. ZELINSKI; G. R. TORAY; J. B. CONNELL; B. METHIG; D. O. PARE; J. J. PATTERSON; J. W. McCARTHY; D. O. ELLIS; E. M. BYRE; JOHN DOES, Nos. 1-100,

Defendants.

VINCENT MANCUSI, KARL PFEIL, RUSSELL G. OSWALD,

Defendants-Appellants.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by Vincent Mancusi

Upon consideration by the panel that decided the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/Elaine B. Goldsmith
ELAINE B. GOLDSMITH
Clerk

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

Akil Al-Jundi, etc., et al.

-vs- Civ-75-132

Nelson A. Rockefeller, etal.

SIR: Take notice that an ORDER was duly granted and entered in the above entitled action, on the 9th day of July 1980.

Dated: Buffalo, New York
July 9, 1980

John K. Adams, Clerk
U.S. District Court
604 U.S. Courthouse
Buffalo, New York 14202

TO: Daniel L. Meyers, Esq.
Robert I. Cantor, Esq.
Robert Abrams, Esq.
Michael A. Gurda, Esq.
Bernard J. Malone, Jr., Esq.
Thomas M. Whalen, III, Esq.
Irving C. Maghran, Esq.
Damon, Morey, Sawyer & Moot
Jaeckle, Fleischmann & Mugel

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

AKIL AL-JUNDI, a/k/a Herbert Scott Deane; BIG BLACK, a/k/a Frank Smith; ELIZABETH DURHAM, Mother and Legal Representative of Allen Durham, deceased; LITHO LUNDY, Mother and Legal Representative of Charles Lundy, deceased; THERESA HICKS, Widow and Legal Representative of Thomas Hicks, deceased; ALICE McNEIL, Mother and Legal Representative of Lorenzo McNeil, deceased; MARIA SANTOS, Mother and Legal Representative of Santiago Santos, deceased; JOMO SEKOU OMOWALI, a/k/a Eric Thompson; VERNON LaFRANQUE; ALFRED PLUMMER; HERBERT X BLYDEN; JOSEPH LITTLE; ROBIN PALMER; GEORGE "CHE" NIEVES; JAMES B. "RED" MURPHY; THOMAS LOUK; PETER BUTLER; CHARLES "FLIP" CROWLEY; WILLIAM A. MAYNARD, JR.; CALVIN HUDSON; KIMANTHI-MPINGO, a/k/a Edward Dingle; and KEN-DU, a/k/a Willie Stokes, on behalf of themselves and all others similarly situated,

CIV-75-132

ORDER TO SHOW CAUSE

Plaintiffs,

-vs-

NELSON A. ROCKEFELLER; RUSSELL A. OSWALD; WALTER DUNBAR; JOHN C. BAKER; A.C. O'HARA; JOHN MONAHAN; JOHN C. MILLER; LEON VINCENT; KARL PFEIL; ROBERT F. FISCHER; WIM VAN EEKEREN; VINCENT MANCUSI; JOHN DOES NOS. 1-100,

Defendants

Upon the court's own motion, counsel for plaintiffs is hereby ORDERED to appear before me in Part II of this court at 9:00 a.m., August 4, 1980, to show cause, if there be any, why this action should not be dismissed for failure to prosecute by reason of plaintiffs' failure to have filed interrogatories, requests to produce and/or notices of depositions no later than June 20, 1980, such date being sixty days from my Order in open court April 21, 1980.

Dated: Buffalo, N. Y.
July 8, 1980

/s/John T. Elfvin
U.S.D.J.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

AKIL AL-JUNDI, a/k/a Herbert Scott Deane; BIG BLACK, a/k/a Frank Smith; ELIZABETH DURHAM, Mother and Legal Representative of Allen Durham, deceased; LITHO LUNDY, Mother and Legal Representative of Charles Lundy, deceased; THERESA HICKS, Widow and Legal Representative of Thomas Hicks, deceased; ALICE McNEIL, Mother and Legal Representative of Lorenzo McNeil, deceased; MARIA SANTOS, Mother and Legal Representative of Santiago Santos, deceased; JOMO SEKOU OMOWALI, a/k/a Eric Thompson; VERNON LaFRANQUE; ALFRED PLUMMER; HERBERT X BLYDEN; JOSEPH LITTLE; ROBIN PALMER; GEORGE "CHE" NIEVES; JAMES B. "RED" MURPHY; THOMAS LOUK; PETER BUTLER; CHARLES "FLIP" CROWLEY; WILLIAM A. MAYNARD, JR.; CALVIN HUDSON; KIMANTHI-MPINGO, a/k/a Edward Dingle; and KEN-DU, a/k/a Willie Stokes, on behalf of themselves and all others similarly situated,

Plaintiffs,

CIV-75-132
MEMORANDUM
and
ORDER

-vs-

NELSON A. ROCKEFELLER; RUSSELL A. OSWALD; WALTER DUNBAR; JOHN C. BAKER; A.C. O'HARA; JOHN MONAHAN; JOHN C. MILLER; LEON VINCENT; KARL PFEIL; ROBERT F. FISCHER; WIM VAN EEKEREN; VINCENT MANCUSI; JOHN DOES NOS. 1-100,

Defendants

Now before me in this protracted civil rights litigation are three matters (two of which are very closely related): plaintiff's motion under Fed.R.Civ.P. rule 25(a) to substitute the Estate of Nelson A. Rockefeller ("the estate") in the place and stead of defendant Rockefeller, defendant Rockefeller's related motion to dismiss and my Order directing plaintiffs to show cause why this action should not be dismissed for failure to comply with my order delivered in open court April 21, 1980 directing plaintiffs to commence discovery within sixty days from such date. I shall treat these issues in the above sequence.

Plaintiffs' motion to substitute the estate for Rockefeller is opposed by all present defendants on grounds of untimeliness. Rule 25(a) requires that a motion to substitute be brought within ninety days from the time a "statement of death" is made upon the record. It is clear that plaintiffs' motion to compel substitution was served on the executors of the estate, through a person authorized by them to receive service, at least by March 18, 1980. The statement of death at issue herein consists of an affidavit sworn to November 7, 1979 by Assistant New York State Attorney General John H. Stewart (then and until my order entered March 22, 1980, representing all defendants) and filed in this court November 13, 1979. However, under Fed.R.Civ.P. rule 5 (incorporated by reference in rule 25(a)), a statement of death is not served when sworn to or when filed with the court, but rather when it is served upon opposing counsel. Defendants in their arguments *assume* that such date was also November 7th; however, Robert I. Cantor, Esq., plaintiffs' attorney, swears that the statement of death was received by Daniel J. Myers, Esq. (another attorney for plaintiffs) on November 28, 1979 and that the envelope containing such suggestion bore a postmark of November 23, 1979. A xerographic copy of what Cantor states to be the envelope in question is attached to Cantor's affidavit; the postmark on such letter contains an "I [love] New York" symbol and thus would appear to have been affixed by the Attorney General's Office rather than by the United States Postal Service. Stewart, in his reply affidavit, does not deny Cantor's claim that the statement of death was not served on plaintiffs by mail until November 23rd. For purposes of this motion, then, I will employ November 23, 1979 as the date of service. Ninety days

from November 23rd is February 21, 1980. Cantor claims that he attempted to locate the executors of the estate beginning in January 1980, that such endeavors were unsuccessful and that an assistant in his firm thereupon contacted the law firm of Milbank, Tweed, Hadley & McCloy ("Milbank") in an attempt to serve the executors. Cantor further claims that, after a delay of several days, his assistant was advised by someone at Milbank in early February that the Attorney General represented the estate in connection with this suit. This assertion appears not to have been contraverted by anyone connected with Milbank. Cantor further claims that Stewart orally agreed February 15, 1980 to accept service on behalf of the executors. This last assertion is flatly and vociferously denied by Stewart. It appears that on or before February 15, 1980 Cantor was in possession of the full names and addresses of the executors, had obtained leave from me to serve them by means of a private process server and could have effected timely service. The motion was, however, mailed to Stewart, instead of being served on the executors directly. Stewart claims that he never represented the estate, was not authorized to accept service of process on its behalf and, as noted above, did not agree to accept process. At least the first two assertions appear to be true. The last is flatly controverted by Cantor and clearly cannot be resolved by me on affidavit. If I were to hold a hearing on this issue and conclude that Cantor's version of the facts is correct, I might well conclude that the consecutive statements, by Milbank that Stewart represented the estate and by Stewart that he would accept process, would estop the estate from denying timely service. However, I conclude that such an evidentiary investigation is not needed because the statement of death served by mail November 23rd did not meet the requirements of Fed.R.Civ.P. rule 25(a) and therefore did not start running the ninety-day time period contained therein.

Rule 25(a) states as follows:

> "(1) If a party dies and the claim is not thereby extinguished, the court may order substitution of the proper parties. *The motion for substitution may be*

> *made by any party or by the successors or representatives of the deceased party* and, together with the notice of hearing, shall be served on the parties as provided in Rule 5 and upon persons not parties in the manner provided in Rule 4 for the service of a summons, and may be served in any judicial district. *Unless the motion for substitution is made not later than 90 days after the death is suggested upon the record by service of a statement of the fact of the death as provided herein for the service of the motion*, the action shall be dismissed as to the deceased party." (Emphasis added.)

The rule carefully distinguishes between "parties" and "successors or representatives of deceased parties," and does not mention "deceased parties" themselves. I therefore interpret rule 25 as allowing a motion to substitute to be made either by the estate of the deceased party (presumably acting through counsel for the estate) or by any other party, but *not* by the deceased party herself or himself (acting through counsel). *See, Boggs* v. *Dravo Corp.*, 532 F.2d 897, 900 (3rd Cir. 1976); *Rende* v. *Kay*, 415 F.2d 983, 985 (D.C. Cir. 1969). Rule 25 further requires that the statement of death be served "as provided herein" for the service of a motion. I interpret this expression as incorporating the same limitations just referred to as to parties. Stewart in his statement of death described himself as the attorney for the deceased party (and not for other parties) and now declaims vigorously that he was and is not counsel to the estate. Under the interpretation just mentioned of rule 25, these assertions render the statement of death filed by him a nullity.

There are at least two additional reasons why the estate should be substituted. First, the statement of death did not list the names of the executors of Rockefeller's estate, although this information should have been readily available to Stewart. The United States Court of Appeals for the District of Columbia Circuit has held that listing the successors or representatives of the estate when such information was readily available to the person making the statement was necessary to make the statement

this Court and by detailing what it believed to be the deficiencies of the proposed notice. Other defendants have not responded.

The plaintiffs' failure to send the notice required under rule 23(c)(2) is found not to have prejudiced any defendant. In addition, notification at this stage in the litigation will not serve to prejudice any rights of any member of the plaintiff class. Decertification is not appropriate.

This Court agrees that the plaintiffs have not properly brought forward the issue of the class notice. Suggestions and comments of counsel would be helpful in determining an appropriate notice and the appropriate means for its promulgation. The plaintiffs shall have twenty days from the filing of this Memorandum and Order in which to move for this Court's approval of a proposed class notice.

The plaintiffs and the Estate have both moved for an order setting time limits for discovery. The plaintiffs, seeking to push this action on to trial, propose that depositions be limited to fifteen per side, that a four-month period be provided for the parties to make and settle requests for admissions and that an additional four months be provided to settle the contents of a final pretrial order. November 13, 1985 affidavit of Elizabeth M. Fink, Esq., ¶15. The Estate proposes that the scheduling order provide that all depositions of class members be completed within one year and that all discovery be completed within eighteen months after the date that notice is provided to the class members.

The knowledge of the individual plaintiffs in this action will affect not only the determination of any damages, but also will affect the decision whether the defendants, or particular defendants, may be held liable for their actions or inactions. Further discovery, including the possibility of numerous depositions, concerning individual plaintiffs' relevant knowledge and experience may be appropriate. This Court, therefore, will not arbitrarily limit the number of depositions each side may conduct. However, some time limit for discovery which may have the concomitant effect of limiting the number of depositions is entirely appropriate.

While the defendants' asserted need to depose each of the approximately 1200 class members is excessive in light of the nature of this litigation, a reasonable time should be provided for the parties to determine from whom further discovery should be sought and to obtain such. Any time limit, of course, must be somewhat arbitrary. Given the nature of the Amended Complaint, the number of parties in this action and the great amount of time the parties have spent reviewing documents, this Court directs that all discovery, including all depositions, shall be completed within seven months of the return date for the filing of notices by individual plaintiffs opting out of the case and that all motions to compel discovery shall be filed prior to termination of that seven-month period. The parties shall have ninety days thereafter in which to serve requests for admissions. All motion to dismiss and/or for summary judgment shall be filed no later than the end of this ninety-day period.

The Estate has moved to compel the plaintiffs to answer its interrogatories and to respond to its requests for documents. Although the answers have yet to be filed, it is this Court's understanding that the plaintiffs have answered. February 26, 1986 Reply Affidavit of Kelley A. Cornish, Esq. ¶11. As Cornish indicates, if the defendants are not satisfied with the answers, they must raise their objections in a separate motion to compel.

Mancusi has moved to dismiss the causes of action designated "Reprisals" and "Bad Faith Prosecutions" or, in the alternative, to decertify those causes of action.[2] The motion rests upon the claim that collateral estoppel bars such causes as they apply to Mancusi. He also claims that requiring him to defend against the charges of reprisals constitutes a denial of due process.

Mancusi has cited a number of cases in support of his contention that the plaintiffs are collaterally estopped. The decision in

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[2] The causes of action for "Bad Faith Prosecutions" have not been certified as class actions. Memorandum and Order dated October 30, 1979 and filed October 31st, p. 45; Memorandum and Order dated June 24, 1985 and filed June 25th, p. 13.

Inmates of Attica Correctional Facility v. *Rockefeller*, 453 F.2d 12 (2d Cir. 1971), reversed this Court's dismissal of a complaint and directed it to impose an injunction preliminarily enjoining brutalizing conduct by state personnel at the facility. That decision did not resolve the issues there presented and cannot serve as a basis or collateral estoppel in this case. *Inmates of Attica Correctional Facility* v. *Rockefeller*, 477 F.2d 375 (2d Cir. 1973), concerned the alleged failure of state and federal authorities to investigate and prosecute persons who were claimed to have mistreated the plaintiffs. The appellate court found that such injunctive relief should not be granted. The issues resolved in that case are not those raised here. *Nieves* v. *Oswald*, 498 F.2d 802 (2d Cir. 1974), addressed the issue of the procedural due process required in interrogating inmates subsequent to the uprisings. That case is not read as having resolved any issue now raised. These cases, therefore, fail to provide rounds for applying the doctrine of collateral estoppel.

In *United States ex rel. Walker* v. *Mancusi*, 467 F.2d 51 (2d Cir. 1972), the named plaintiffs, representing a class of prisoners who had been segregated from the general inmate population in the Attica facility and incarcerated in a special housing unit known as "A Block, 6 Company," claimed that the segregation had violated their Eighth Amendment and Fourteenth Amendment rights. It was determined that the segregation had not constituted cruel and unusual punishment and had not violated the plaintiffs' equal protection or due process rights. *Id.* at 53. The plaintiffs in this action claim that segregation and punitive segregations violated their rights under those amendments. Amended Complaint ¶¶60(f), 61(d). To the extent that the plaintiffs' claims arise out of detentions in the "A Block, 6 Company" and that those claims duplicate those already adjudicated in *United States ex rel. Walker* v. *Mancusi*, *supra*, the claims are barred by collateral estoppel. However, this Court lacks sufficiently detailed information upon which to determine whether the segregation here complained of is the same as that in *United States ex rel. Walker* v. *Mancusi*. If collateral estoppel in fact applies, only discrete portions of the instant plaintiffs' Amended Complaint will be barred. The collateral estoppel issues raised

by no means will result in the dismissal of the entire causes of action for reprisals.

Mancusi has not directed this Court's attention to any determination which would collaterally estop the plaintiffs from pursuing their cause of action based on his claimed bad faith prosecutions. This Court, in its October 30, 1979 Memorandum and Order, narrowed the scope of the Amended Complaint's allegation of bad faith prosecutions but found that the plaintiffs had stated a cause of action against Mancusi. Dismissal at this time is not appropriate. In addition, Mancusi's due process arguments are also not found to provide a basis for dismissal of this action as it applies to him.

Finally, Mancusi argues that the class certified for the causes of action for reprisals should be decertified because paragraphs 61 through 64 of the Amended Complaint state that they apply only to certain members of the class. This Court noted in its October 31, 1979 Memorandum and Order that "[i]f, at a later point in the lawsuit, it becomes apparent that fewer than all the class members were subject to reprisals, a subclass can be defined."[3] Nothing has changed since that decision. No basis is found at this time to certify a subclass and no basis is provided to justify the requested decertification.

The Attorney General of the State of New York has moved for a protective order permitting the State to withhold certain documents from discovery. The issues raised were discussed in this Court's Memorandum and Order dated June 24, 1985. Since the issuance of that decision the State has labelled and cataloged the material which it claims is privileged and has detailed the privileges it asserts apply to each document. The seventy-eight items for which an attorney's work-product privilege had originally been claimed have been destroyed, apparently

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[3] It should be noted that Paragraph 60 of the Amended Complaint, which also relates to reprisals, does not indicate that the actions complained of therein affected only certain plaintiffs.

inadvertently. The motion as to these items, if not entirely mooted, is denied without prejudice to its reassertion upon the possible reconstruction of those documents. As to items of grand jury testimony and records and volumes II and III of the Meyer Report and McKay Commission records, this Court finds no reason to change the determinations made in its June 1985 Memorandum and Order. These items remain protected from discovery until such time as a party satisfies the concerns addressed in that decision and complies with its requirements as to these items.

The issue has been raised that the State has waived any privilege by having disclosed to the plaintiffs items now claimed as privileged. *See* Third Declaration of Richard E. Moot, Esq. in Support of Motion by Defendant Vincent R. Mancusi for an Extension of Time in Which to Examine Attica Documents, ¶¶5, 6. A troublesome problem exists whether the person who may have revealed certain privileged items to the plaintiffs had the power under the State's law to waive any privilege absent an order issued by a court of the State. However, that issue need not be addressed here. Edward J. Perry, Jr., Esq., avers that, while it is possible and even probable that the plaintiffs' attorney glanced at or examined some of the items now claimed to be privileged, he remembers no specific document reviewed by the plaintiff's attorney which the State now claims is privileged. It must be remembered that the plaintiffs' attorney apparently reviewed tens of thousands of documents. Under these circumstances and unless the items for which a privilege has been claimed had been in some manner particularly marked or noted by the plaintiffs' attorney, no practicable way exists to determine the documents which were reviewed and as to which a privilege is now asserted. This Court is not prepared to order opened all files for which a privilege is claimed simply based upon the claim that the plaintiff may have glanced at or reviewed some unidentified items.

Accordingly, it is hereby ORDERED (a) that the Estate's motion to decertify the class is denied (as always, without prejudice), (b) that the motions for a scheduling order are granted as noted above in the final three sentences of the seventh paragraph hereof, (c) that the Estate's motion to compel the plaintiffs to answer

its interrogatories is denied as moot (the plaintiffs, however, are directed to file their answers with the Clerk of this Court), (d) that the Estate's motion for fees is denied, (e) that the plaintiffs' motion for a protective order is denied, (f) that Mancusi's motion to dismiss or to decertify the class is denied, (g) that New York's motion for a protective order is denied without prejudice and (h) that the plaintiffs shall have twenty days from the filing of this Memorandum and Order to move for this Court's approval of a proposed class notice.

It is further hereby ORDERED that, in the interest of expediting discovery, this action is referred to the Honorable Edmund F. Maxwell, United States Magistrate for the Western District of New York, who, as authorized by rules 16 and 35 of the Local Rules of Practice of this Court, shall schedule and oversee conferences with the attorneys for the parties for the purposes set out in Fed.R.Civ.P. rule 16 and shall hear and determine all nondispositive pretrial motions as authorized by 28 U.S.C. §636(b)(1)(A).

ALL PAPERS ARE STILL TO BE FILED IN THE CLERK's OFFICE.

Dated: Buffalo, N. Y.
April 2 , 1987

/s/John T. Elfvin
U.S.D.J.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

AKIL AL JUNDI a/k/a Herbert Scott Deane, et al,

Plaintiffs

vs. CIVIL 75-132E

THE ESTATE OF NELSON A. ROCKEFELLER, et al,

Defendants.

SIR/MADAM: Take *NOTICE* OF AN ORDER, a JUDGMENT of which the within is a copy, duly granted in the above entitled action on the 26 day of June, 1990, and entered in the Office of the Clerk of the United States District Court, Western District of New York, on the 26 day of June, 1990.

DATED: Buffalo, New York
June 27, 1990

MICHAEL J. KAPLAN, Clerk
United States District Court
Western District of New York
Buffalo, New York 14202

cc: Donald P. Berens, Jr., Esq.
Irving Maghran, Jr., Esq.
Richard Moot, Esq.
Michael E. Deutsch, Esq.
Joshua Effron, Esq.
John Stenger, Esq.
Elizabeth Fink, Esq.
Michael McCarthy, Esq.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

AKIL AL-JUNDI, a/k/a Herbert Scott Deane; BIG BLACK, a/k/a Frank Smith; ELIZABETH DURHAM, Mother and Legal Representative of Allen Durham, deceased; LITHO LUNDY, Mother and Legal Representative of Charles Lundy, deceased; THERESA HICKS, Widow and Legal Representative of Thomas Hicks, deceased; ALICE McNEIL, Mother and Legal Representative of Lorenzo McNeil, deceased; MARIA SANTOS, Mother and Legal Representative of Santiago Santos, deceased; LAVERNE BARKLEY, Mother and Legal Representative of L.D. BARKLEY, deceased; JOMO JOKA OMOWALE, a/k/a Eric Thompson; VERNON LAFRANQUE; ALFRED PLUMMER; HERBERT X BLYDEN; JOSEPH LITTLE; ROBIN PALMER; GEORGE "CHE" NIEVES; JAMES B. "RED" MURPHY; THOMAS LOUK; PETER BUTLER; CHARLES "FLIP" CROWLEY; WILLIAM MAYNARD, JR; CALVIN HUDSON; KIMANTHI MPINGO, a/k/a Edward Dingle; KENDU HAIKU, a/k/a Willie Stokes; OOJI KWESI SEKOU, a/k/a Chris Reed; PHILLIP "WALD" SHIELDS; JEROME ROSENBERG; ALPHONSO ROSS; FRANK LOTT; GARY RICHARD HAYNES; RAYMOND SUMPTER; OMAR SEKOU TOURE a/k/a Otis McGaughey; DACA-JEWEIAH, a/k/a John Hill; and JOHNNIE BARNES, as the Administrator of the goods, chattels and credits which were of John Barnes, deceased, on behalf of themselves and all others similarly situated,

CIV-75-132E

MEMORANDUM
and
ORDER

Plaintiffs,

-vs-

THE ESTATE OF NELSON A. ROCKEFELLER; RUSSELL G. OSWALD; T. NORMAN HURD; WALTER DUNBAR; WIM VAN EEKEREN; JOHN C. MILLER; JOHN MONAHAN; JOHN C. BAKER; A.C. O'HARA; VINCENT MANCUSI; LEON VINCENT; CARL PFEIL; ROBERT F. FISCHER; DALTON CARNEY; HENRY WILLIAMS; J.C. MOOCHLER; A.T. MALOVICH; ROBERT P. QUICK; W.L. SHURTER; K.E. GELLERT; G.K. ELBET; T.N. KRUK; W.K. DILLON; M.K. HALLORAN; K.S. CROUSE; R.J. DWYER; P.P. ZELINSKI; G.R. TORAY; J.B. CONNELL; B. MUTHIG; D.O. PARR; J.J. PATTERSON; J.W. McCARTHY; D.O. ELLIS; E.M. BYRE; and JOHN DOES NOS. 1-100,

Defendants.[1]

This is a civil rights class action suit arising out of an inmate uprising at the Attica (N.Y.) Correctional Facility ("Attica") in September 1971. Each of defendants Russell A. Oswald (the former Commissioner of New York's Department of Correctional Services), Vincent Mancusi (the former Attica Superintendent) and Karl Pfeil (Mancusi's Assistant Deputy) has presently moved for summary judgment.

The undisputed background facts of the uprising are recounted in a prior decision in this matter and need be only

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[1] Plaintiffs Durham, Lundy, Hicks, McNeil, Santos and Barkley have been dismissed for lack of standing. Memorandum and Order, dated October 30, 1979, at p.21. Plaintiff Barnes has recently been added by consolidation of a related suit. *See Barnes* v. *State of New York*. CIV-73-442E (W.D.N.Y. January 8, 1990). He had sued certain defendants which are not parties to this action – *viz*, The State of New York, Paul D. McGinnis and The State Corrections Committee. The claims against these defendants are deemed to have been abandoned. Concerning the status of the various captioned defendants herein, *see* fn.6 hereinbelow.

briefly summarized for purpose of the present motions. *See Al-Jundi* v. *Estate of Rockefeller*, CIV-75-132E (W.D.N.Y. September 24, 1988), *aff'd*. 885 F.2d 1060, 1062-1065 (2d Cir. 1989).[2] More than 1200 Attica inmates rioted and occupied certain areas of the prison September 9, 1971. These inmates, or certain of them, also took as hostages numerous corrections officers. Several areas of the prison were re-captured that same day by corrections officers assisted by State Police officers,[3] and the inmate take-over was consolidated to certain limited areas, including a prison space known as "D-Yard." Commissioner Oswald arrived on the scene in the afternoon of September 9th and negotiations between him and the inmates were commenced and continued for several days until the morning of September 13th. It was then that Oswald delivered a final plea to the inmates to release their hostages and restore order. This plea was rejected. Oswald then obtained authorization from the now-deceased Governor Nelson Rockefeller to order the State Police to retake the prison, with force if necessary.

The now-deceased Major John Monahan of the State Police devised the plan for re-capturing Attica. The plan proved successful in the sense that the prison was re-captured and order was restored, but in the process ten hostages and twenty-nine inmates lost their lives. Afterward, brutal reprisals allegedly were inflicted on the prisoners.

The Amended Complaint, filed September 11, 1975,[4] denominates eleven separate causes of action. The divisions

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[2] Both this Court's decision and the appellate decision affirming such contain detailed background discussions.

[3] Eleven hostages were rescued, one of whom later died of inmate-inflicted wounds.

[4] The Amended Complaint is labelled by the plaintiffs simply "COMPLAINT-CLASS ACTION," but was their second pleading herein, filed of right, and has been construed and regarded by this Court as their Amended Complaint. *See* Memorandum and Order, dated October 30, 1979, at p.2 fn.2 & p.4 fn.3.

among these counts are not readily comprehensible, whether by defendants, by causes of action or by sequence of events,[5] and hence this Court, in its prior orders, has endeavored to establish a more natural division of the claims therein. The Amended Complaint has been broken down sequentially into "three sections."

> "The first deals with the plan to retake and the actual retaking of the prison, the second complains of the alleged "reprisals" that occurred after the retaking and the third is concerned with the criminal prosecution of inmates for their participation and involvement in the events preceding and leading to the armed retaking." *Al-Jundi* v. *Estate of Rockefeller, supra*, at p.2.

Moreover, it has been understood throughout this lengthy litigation that each of the various constitutional claims (brought under the due process and equal protection clauses of the Fourteenth Amendment, the cruel and unusual punishment proscription of the Eighth Amendment, and the due process clause of the Fifth Amendment), as well as the claims asserting a conspiracy to deprive the plaintiffs of their civil rights under 42 U.S.C. §1985(3), relates to each sequential section. *See Al-Jundi* v. *Estate of Rockefeller) supra*, at p.2.

Pertinently, for purposes of the instant motions, the allegations of the first section of the Amended Complaint have already been dismissed as against Mancusi and Pfeil. *See* Memorandum and Order, dated October 30, 1979, at p.40. Pfeil has also been dismissed with relation to the allegations of the third section.

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[5] So far as can be ascertained, all counts relate to all defendants, although certain counts identify certain defendants by name as being among others. Several counts reference identical constitutional and/or statutory provisions, and the first count, aside from its substantive claim or claims, makes jurisdictional allegations, and identifies the parties and "facts" common to all counts. Finally the lattermost counts are largely one-sentence reallegations-by-reference of earlier paragraphs labelled with different asserted causes of action.

Id., at pp. 33-36, 40. Each of the three sections remains operative as to Oswald.[6]

In support of their motions for summary judgment, each of Oswald, Mancusi and Pfeil has asserted that he enjoys qualified immunity from suit.[7] They also argue that the undisputed material facts do not support the plaintiffs' constitutional claims against them.

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[6] As for the other defendants, the estate of the late Governor Rockefeller had been substituted in his stead upon his death in 1979, and the estate was eventually dismissed on the basis of qualified immunity and the Governor's lack of personal involvement in the events. *Al-Jundi* v. *Estate of Rockefeller, supra.* Dunbar was dismissed for the plaintiff's failure to substitute his estate following his death in 1975. Memorandum and Order, dated October 30, 1979, at pp. 7-8. Van Eekeren, Miller, Vincent, Hurd, Carney, Williams, Moochler, Malovich, Quick, Shurter, Gellert, Elbet, Kruk, Dillon, Halloran, Crouse, Dwyer, Zelinski, Toray, Connell, Muthig, Parr, Patterson, McCarthy, Ellis and Byre were all dismissed for lack of service upon them of the Amended Complaint. *Id.*, at pp. 7, 14. New York Deputy Attorney General Fischer was dismissed on the basis of prosecutorial immunity. *Id.*, at pp. 28-29 *and* Order, dated April 23, 1980. Baker was dismissed without opposition. Order, dated October 20, 1980. O'Hara was dismissed for lack of allegations of personal involvement. Memorandum and Order, dated October 30, 1979, at p.40. And the defendants Doe were all dismissed for the plaintiff's failure to substitute named defendants within a reasonable period of time. *Id.*, at p.15. Aside from the three movants, the only remaining defendant is the late John Monahan, whose estate might or might not be substituted depending on this Court's resolution of a pending motion. *See* Memorandum and Order, dated June 14, 1990.

[7] As an off-shoot of their qualified immunity defenses, each also contends that an action asserting a deprivation of constitutional rights brought under 42 U.S.C. §1983 cannot lie against them, inasmuch as state officials acting in their official capacities are not "persons" who may be sued within the contemplation of section 1983. *See Will v. Michigan Dept. of State Police ("Will")*, 490 U.S.____, 109 S.Ct. 2304 (1989). This contention, however, is nothing more than a warmed-over version of an Eleventh Amendment *sovereign* immunity defense under a slightly variant theory. And these defendants have already been dismissed from this suit in their official capacities. Memorandum and Order, dated October 30, 1979, at pp. 15-16. Nothing in *Will* or the Eleventh Amendment precludes a section 1983 suit against state officials in their *individual* capacities, which is precisely the footing upon which this suit against these defendants presently stands.

Because qualified immunity provides immunity from suit and not merely a shield to liability — *Al- Jundi* v. *Rockefeller*, *supra*, 869 F.2d at 664; *see Mitchell* v. *Forsyth*, 472 U.S. 511, 526 (1985) ("even such pretrial matters as discovery are to be avoided if possible") —, this Court will first address this defense before considering the adequacy of the facts to support the plaintiffs' claims. The qualified immunity doctrine seeks to strike a balance between protecting the rights of individuals, on the one hand, and "the need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority," on the other. *Butz* v. *Economou*, 488 U.S. 478, 506 (1978). Thus, "government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982). "The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates the right. This is not to say that an official action in question has previously been held unlawful, *** but it is to say that in the light of pre-existing law the unlawfulness must be apparent." *Anderson* v. *Creighton*, 483 U.S. 635, 640 (1987).

The *current* state of the law is set forth in a 1986 decision, *Whitley* v. *Albers*, 475 U.S. 312, wherein the Court enunciated the "standard govern[ing] a prison inmate's claim that prison officials subjected him to cruel and unusual punishment by shooting him during the course of their attempt to quell a prison riot." *See id.*, at 314. It was first noted that "[n]ot every governmental action affecting the interests or well-being of a prisoner is subject to Eighth Amendment scrutiny ***." *Id.*, at 319. " 'After incarceration, only the " 'unnecessary and wanton infliction of pain' " . . . constitutes cruel and unusual punishment forbidden by the Eighth Amendment.' " *Ibid.* (*quoting from Ingraham* v. *Wright* ,430 U.S. 651, 670 (1977)). In applying this standard to a "prison security measure *** undertaken to resolve a disturbance," the Court determined that

> "the question whether the measure taken inflicted unnecessary and wanton pain and suffering ultimately

> turns on 'whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.' " *Id.*, at 320-321 (*quoting from Johnson* v. *Glick*, 481 F.2d 1028, 1033 (2d Cir.), *cert. denied sub nom.* Employee Officer John *v.* Johnson, 414 U.S. 1033 (1973)).

Courts must determine on a summary judgment motion, however, "whether the evidence goes beyond a mere dispute over the reasonableness of a particular use of force or the existence of arguably superior alternatives. Unless it appears that the evidence, viewed in the light most favorable to the plaintiff, will support a reliable inference of wantonness in the infliction of pain ***, the case should not go to [trial]." *See id.*, at 322 (discussing the approach on a motion for directed verdict); *see also Anderson* v. *Liberty Lobby*, 317 U.S. 242 (1986) (equating the standards for directed verdict and summary judgment motions.) The factors to be considered in applying this approach include (1) the need for the application of force, (2) the relationship between such need and the amount of force employed and (3) the extent of injury indicted thereby. *Whitley* v. *Albers*, *supra* at 321. "From such considerations inferences may be drawn as to whether the use of force could plausibly have been thought necessary, or instead evinced such wantonness with respect to the unjustified infliction of harm as is tantamount to a knowing willingness that it occur." *Ibid.* But other factors, such as the threat to the safety of prison staff and inmates and any efforts to avoid or temper a forceful response, are "equally relevant." *Ibid.*

Although *Whitley* v. *Albers*, *supra*, was not enunciated until 1986, its application of the cruel and unusual punishment clause to prison officials' efforts to quell an inmate uprising displays nothing more esoteric than a common-sense approach to the problem and, moreover, derives its inspiration from the accumulated wisdom of Eighth Amendment decisional law dating well prior to September 1971. *See Ingraham* v. *Wright*, 430 U.S. 651, 670 (1977) (cited in *Whitley* v. *Albers* as authority for the wantonness standard); *Estelle* v. *Gamble*, 429 U.S. 97, 103 (1976) (relied upon in *Ingraham* v. *Wright*); *Gregg* v. *Georgia*, 428 U.S.

effective under rule 25, for otherwise an opposing party could be put to an unfair burden of locating and serving the representatives before the ninety-day period expired. *Rende* v. *Kay*, *supra*, at 985; *Advisory Committee Note* to rule 25. Although the executors of a prominent public figure like Rockefeller would presumably be less difficult to locate than those of a less well known private individual, it appears from Cantor's affidavit that a substantial amount of time herein was consumed, first, by attempts to locate the executors themselves and then by efforts to contact Milbank, none of which efforts would have been necessary had the statement of death dated November 7, 1979 simply named the executors. For this reason I am persuaded to adopt the reasoning of *Rende*. It has been repeatedly stated and held that the reason rule 25(a) was amended to its current form in 1963 was to avoid the harsh and unfair results that the former inflexible version of rule 25 occasionally mandated. *See*, *e.g.*, Advisory Committee Note to rule 25; *Roscoe* v. *Roscoe*, 379 F.2d 94, 99 (D.C. Cir. 1967). "[T]he 90-day period was not intended to act as a bar to otherwise meritorious actions." *Staggers* v. *Otto Gerdau Company*, 359 F.2d 292, 296 (2d Cir. 1966). Adoption of the *Rende* rule would, on the facts of this case, promote this remedial flexibility. *See*, *National Equipment Rental* v. *Whitecraft Unlimited*, 75 F.R.D. 507 (E.D.N.Y. 1977).

Additionally, if the statement filed by Stewart were held to be effective, I would nonetheless hold that a sufficient showing of excusable neglect had been made to qualify for an extension of time under rule 6(b). Such a showing consists of a demonstration of good faith and "some reasonable basis for noncompliance with the time specified in the rules." 4 Wright & Miller, Federal Practice and Procedure: Civil §1165, at 622 (1969). In this circuit, especially in the rule 25 context, a successful showing is more easily made when the opposing side has suffered no prejudice. *See*, *e g.*, *Yonofsky* v. *Wernick*, 362 F.Supp. 1005, 1010-15 (S.D.N.Y. 1973). Inasmuch as Stewart mailed the motion to substitute to the executors within a few days of its receipt and Milbank (now formally named as the attorney for the estate) had at least some knowledge of it at an even earlier time through the contacts by Cantor's office, no prejudice has been shown or apparently could have resulted.

As I have noted, Cantor by February 15th had the names and addresses of the executors. He could easily have made timely service upon them. Alternatively, he probably could have served the Surrogate of Westchester County and also effected timely service. Instead, he "served" the motion by mailing it to Stewart's office by reason, according to Cantor, of an oral agreement by Stewart to accept service of process. Stewart, as noted above, denies having ever so agreed. Accepting as true Stewart's denial, it appears that Cantor's act was precisely the sort of unfortunate blunder for which rule 6(b) was intended to make amends. Plaintiffs could, on February 15th, have made timely service; that they did not seems clearly due to excusable neglect.

The estate further argues that plaintiffs' motion must be denied because service was not made upon all parties. At all times in this litigation prior to March 22, 1980, the Attorney General was counsel to all defendants. Mailing the moving papers to Stewart was sufficient service of the motion under rule 5. The estate further invites me to exercise my discretion as shown in the permissive language of rule 25(a)(1) to refuse to permit the substitution even if technically timely. Although Rockefeller's demise was attended by considerable publicity and occurred more than one year prior to the making of the motion to substitute his estate, in view of the quiescent status of this litigation prior to my Memorandum and Order of October 30, 1979 and the total absence of a showing of prejudice to administration or distribution of the estate on account of such delay (*Cf.*, *Anderson* v. *Yunkau*, 329 U.S. 482 (1947)), I decline to exercise such discretion.

For these reasons, plaintiffs' motion to substitute the Estate of Nelson A. Rockefeller in his place hereby is ORDERED granted. Such disposition moots the motion by Rockefeller for dismissal, which motion is accordingly hereby ORDERED denied.

The final matter before me involves my Order to Show Cause dated July 8, 1980, wherein counsel for plaintiffs was ordered to show cause before me August 4, 1980 why this action should

not be dismissed for failure to commence discovery proceedings as directed by my order in open court April 21, 1980. Counsel for plaintiffs (who had earlier moved for leave to withdraw on the grounds that he was unable adequately to represent plaintiff class herein) stated, and offered some proof, that he has been engaged in attempting to locate new counsel for plaintiff class. However, his only stated reason for his complete failure to commence discovery as ordered by this court — that at least some of the counsel with whom he was negotiating to assume his responsibilities as counsel for plaintiffs were insisting that they have charge of all future matters, including discovery — completely fails to excuse his failure to obey the order of this court or to apply for relief therefrom. This inexcusable failure, combined with such previous lapses as the repeated failure to effect service of the various pleadings in this action and the admissions of counsel in connection with his motion to withdraw, leads me inescapably to the conclusion that the named plaintiffs herein are not adequate representatives for the more than 1,200 persons they seek to represent.[1] This requires that the class action certification granted in my October 30, 1979 Memorandum and Order be and it hereby is ORDERED revoked. Such revocation is expressly without prejudice to the right of the named plaintiffs to move again for class action certification at such time as they may feel themselves to be adequate representatives; furthermore, it is expressly ORDERED that such revocation does not restart the running of the statute of limitations as to any members of the plaintiff class not named as plaintiffs herein.[2]

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[1] As an example (which would be far from determinative by itself), a motion was returned before me October 20, 1980 seeking dismissal as to defendant Baker. No one appeared in opposition or otherwise on behalf of plaintiff class and the motion was granted.

[2] Because such revocation is without prejudice, such does no more than return this action to its status prior to the actual granting of the motion for class certification but after such motion had been made. In particular, it is *not* intended that such revocation end the tolling of the statute of limitations in effect as to all members of the class since the commencement of this action.

For these same reasons, it is hereby ORDERED that this action is dismissed for failure to prosecute and to obey my express orders unless plaintiffs shall have appointed new counsel and such new counsel shall have obtained my consent to his or their substitution in the place and stead of Robert I. Cantor, Esq., within ninety days of the entry of this Memorandum and Order.

Dated: Buffalo, N. Y.
October 27, 1980

/s/John T. Elfvin
U.S.D.J.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

AKIL AL-JUNDI, a/k/a Herbert Scott Deane; BIG BLACK, a/k/a Frank Smith; ELIZABETH DURHAM, Mother and Legal Representative of Allen Durham, deceased; LITHO LUNDY, Mother and Legal Representative of Charles Lundy, deceased; THERESA HICKS, Widow and Legal Representative of Thomas Hicks, deceased; ALICE McNEIL, Mother and Legal Representative of Lorenzo McNeil, deceased; MARIA SANTOS, Mother and Legal Representative of Santiago Santos, deceased; JOMO SEKOU OMOWALI, a/k/a Eric Thompson; VERNON LaFRANQUE; ALFRED PLUMMER; HERBERT X BLYDEN; JOSEPH LITTLE; ROBIN PALMER; GEORGE "CHE" NIEVES; JAMES B. "RED" MURPHY; THOMAS LOUK; PETER BUTLER; CHARLES "FLIP" CROWLEY; WILLIAM A. MAYNARD, JR.; CALVIN HUDSON; KIMANTHI-MPINGO, a/k/a Edward Dingle; and KEN-DU, a/k/a Willie Stokes, on behalf of themselves and all others similarly situated,

CIV-75-132
MEMORANDUM and ORDER

Plaintiffs,

-vs-

NELSON A. ROCKEFELLER; RUSSELL A. OSWALD; WALTER DUNBAR; JOHN C. BAKER; A.C. O'HARA; JOHN MONAHAN; JOHN C. MILLER; LEON VINCENT; KARL PFEIL; ROBERT F. FISCHER; WIM VAN EEKEREN; VINCENT MANCUSI; JOHN DOES NOS. 1-100,

Defendants

Now before me in this protracted and convoluted civil rights action arising from the September 1971 rebellion at the Attica (N.Y.) Correctional Facility are several matters relating to my Memorandum and Order entered October 27, 1980, amended *nunc pro tunc* by my Order entered November 21, 1980, which ordered the case dismissed unless plaintiffs commenced discovery, in accordance with my order in open court April 21, 1980, within 120 days following October 27, 1980.

On the last day of such period, February 24, 1981, there were filed with the Clerk of this District a large number of notices to take depositions and requests to produce documents, purportedly on behalf of the plaintiffs. Such notices and requests (hereinafter simply called "notices") were not hand-signed at all and bore typewritten signatures as follows:

> "ELIZABETH M. FINK, attorney for Akil Al-Jundi, Oji Kwesi Sekou and Kimanthi M'Pingo.
>
> "SUSAN CARPENTER, Attorney for plaintiffs.
>
> "MARTIN R. STOLAR, Stolar Alterman & Gulielmetti, P.C., Attorney for Alfred Plummer
>
> "FRANK 'BIG BLACK' SMITH, *pro se*, c/o Polly Eustis, Esq. [an associate of Elizabeth Fink, Esq.]
>
> "JEROME ROSENBERG, *pro se*
>
> "ELIZABETH A. GAYNES , ESQ., attorney for Jemo Joka Omawale."

The notices were accompanied by several documents, consisting of (a) an affidavit by Daniel L. Meyers, Esq., consenting to his being replaced by Fink and Carpenter, (b) an affidavit by Akil Al-Jundi "advising" that Robert I. Cantor, Esq. was not his attorney, "advising" that Elizabeth Fink is his attorney and requesting her substitution for all purposes, (c) a hand-signed letter from Martin R. Stolar, Esq. advising that he appears on

behalf of Alfred Plummer, and (d) a telegram from Elizabeth Gaynes, Atty., "adopting" on behalf of her client, Jomo Joka Omawale,[1] "all motions filed by attorneys for plaintiffs" in this action. None of these documents relating to the substitution, except Stolar's letter, was served on opposing counsel. On February 27, 1981, I endorsed upon Meyers's affidavit "Approved and so ORDERED nunc pro tunc February 24, 1981."

Shortly thereafter, defendants Rockefeller, Oswald, Mancusi, Pfeil and Monahan moved individually to vacate my Order of February 27, 1981, strike the notices filed and dismiss the action for lack of prosecution.[2] Oral argument was held on such motions April 6, 1981. Such motions will be granted in part and denied in part.

The grounds for the instant motions are tenable and straightforward: that there has been no valid substitution of the group of counsel signing the notices for those formerly of record herein, that my order approving such substitution is therefore erroneous, that these counsel are without authority to file these notices, that accordingly these notices are null, void and of no effect, and that, finally, there has been no compliance with my October 27th Memorandum and Order as amended and that this suit may and should therefore be dismissed for failure to prosecute.

A discussion of this issue must begin with the fact that there has from the commencement of this action been an unfortunate degree of uncertainty as to the identity of plaintiffs' counsel. The original complaint herein bore the hand signature of Daniel L. Meyers, and the typewritten "signatures" of Peter A. Joseph, Jethro Eisenstein, and Richard M. Asche, all as "attorneys for

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[1] Presumably the same individual named in the original complaint as Jomo Sekou Omowali, and in the notices as Jemo Joka Omawale.

[2] Defendant Pfeil also moved for a protective order objecting to the time and place of the noticed depositions; at oral argument I denied this motion without prejudice to its reassertion after the issue of substitution of counsel was resolved.

plaintiffs and members of the plaintiff class," and the typewritten signatures of Martin R. Stolar, Esq., as attorney for Alfred Plummer, Herbert X. Blyden, plaintiff *pro se*, and Clark and Harley, attorney [sic] for the Estate of Alonzo McNeil. The Amended Complaint filed in this court bears the hand signatures of Daniel L. Meyers, Esq., and of Richard M. Asche, Esq., and the typed signatures of Dennis Cunningham, Esq. and Michael Deutsch, Esq., all as "attorneys for plaintiffs," and the typed signatures of Stolar, Blyden, and Clark and Harley. No objection was then raised as to the adequacy of the original or amended complaints under Fed.R.Civ.P. rule 11.

Several different attorneys have appeared in this suit at various times in support of plaintiffs' positions. A stipulation extending defendants' time to answer while this action was pending before the Southern District of New York was signed for Daniel L. Meyers by a Robert S. Markfield, Esq., whose relation to Meyers is not known. An affidavit dated September 4, 1975 requesting the appointment of a private process server was filed by a Thomas J. Burke, Esq., described as an employee of the "Attica Brothers Trial Office." At oral argument on plaintiffs' motions for class certification and defendants' motion to dismiss, plaintiffs were represented by Meyers and by one Abigail Pessen, Atty. At a pretrial conference held before me in 1976, there appeared Meyers, on behalf of all plaintiffs, and Elizabeth Gaynes, on behalf of plaintiff Jomo Joko Omawale.[3] More recently, Robert I. Cantor, Esq., who, it appears, was then an associate of Meyers but who did not so describe himself, filed November 30, 1979 a notice of appeal from my decision herein entered October 31, 1979. Cantor thereafter appeared several times as "one of the attorneys" for plaintiffs. While it is perhaps regrettable that tighter control has not been exercised over the representation of plaintiffs and while I do not condone the failure of plaintiffs' new purported counsel to follow the accepted practices and

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[3] This is the spelling as transcribed by the court reporter. It appears to be yet another variation of the names noted at note 1 *supra*. Gaynes did not subscribe either complaint on behalf of this client.

the requirements of Local Rule 4, such failures are not particularly new herein, and have not previously been objected to. I am also obliged to consider that plaintiffs, most of whom remain prisoners, have a severely limited choice of private counsel and significant difficulties in communicating with such counsel.

Additionally, during oral argument on the instant motion, Elizabeth Fink promised to obtain and file consents to her substitution in place of Daniel Meyers as counsel from all the named plaintiffs before the end of April 1981. Such promise was complied with in part, as will be discussed *infra*.

It is clear that plaintiffs' new counsel did not comply and, in fact, seemed to make no serious effort to comply with the requisites for substitution of counsel before filing the notices. Substitution of counsel is a matter of fundamental importance; it must therefore be decided by the client. A lawyer may not properly delegate a matter, even to an associate in his office, without at least the implied consent of the client. Express consent is required for the substitution of counsel outside his firm. No such consent was obtained prior to filing the notices herein. Additionally, under Local Rule 4, notice to the opposing counsel, who may be substantially interested because of delays or other factors, and an order of the court are required before a counsel may withdraw, as Meyers sought to do here. In a case where the clients had ordinary access, financial and physical, to counsel, such failures would be wholly inexcusable. I would dismiss the action for failure to comply with my October 27, 1980 Order, except for Blyden, who has been and remains *pro se*, and Plummer, represented from the filing of the original complaint herein by Martin Stolar, Esq. But, by reason of the aforementioned special circumstances, as to those plaintiffs from whom Fink has secured actual consent or who have expressed their desire to proceed *pro se*, I decline at the present time to dismiss this suit; as to the others, however, unless Fink (or Gaynes, in the case of Omowali) demonstrates promptly that such plaintiffs consent to her acting for them and, not coincidentally, that they have an interest in this suit (at least sufficient to induce them to fill out a simple consent form) and properly

serve such upon defendants, this action must be dismissed. Accordingly, it is hereby

ORDERED that as to Al-Jundi, Smith, Plummer, Blyden, Little, Palmer, Nieves, Crowley, Hudson, M'Pingo, Stokes, Sekou and Rosenberg,* defendants' motions are denied; that permission is hereby given for plaintiffs Smith and Rosenberg to proceed *pro se*; that Fink is hereby substituted for Meyers as counsel for plaintiffs Al-Jundi, Little, Palmer, Nieves, Crowley, Hudson, M'Pingo, Stokes and Sekou.

However, it is further ORDERED that the claims of Murphy, Louk, Butler, Maynard, Omowali, Lafranque, Shields, Ross, Lott, Haynes, Sumpter, Toure and Dacajeweiah are dismissed for failure to prosecute except for the claims of each of these persons for whom there shall have been filed with the Clerk and served upon opposing counsel within thirty days of the entry of this Memorandum and Order a written form in which he personally consents to the substitution as his counsel herein of Fink (or Gaynes, in the case of Omowali) for Meyers.

Dated: Buffalo, N. Y.
May 15, 1981

/s/John T. Elfvin
U.S.D.J.

* Plaintiffs Sekou, Shields, Rosenberg, Ross, Lott, Haynes, Sumpter, Toure and Dacajeweiah were added by the amended complaint herein and therefore do not appear in the caption.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

Akil Al-Jundi, et al.

-vs- Civ-75-132E

Nelson A. Rockefeller, et al.

SIR: Take notice that an ORDER was duly granted and entered in the above entitled action, on the 15th day of May 1981

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

AKIL AL-JUNDI, a/k/a Herbert Soctt Deane, et al.,

Plaintiff,

vs CIV 75-132-E

THE ESTATE OF NELSON A. ROCKEFELLER; RUSSELL A. OSWALD; WALTER DUNDAR; et al.,

Defendants.

SIR/MADAM: Take notice of an ORDER, of which the within is a copy, duly granted in the within entitled action on the 2nd day of April, 1987, and entered in the Office of the Clerk of the United States District Court, Western District of New York on the 3rd day of April, 1987

Dated: Buffalo, New York
April 3, 1987

EDWARD P. GUETH, JR., Clerk
United States District Court
Western District of New York
U.S. Court House
Buffalo, New York 14202

cc: Elizabeth M. Fink, Esq.
Susan E. Carpenter, Esq.
Dennis Cunningham, Esq.
James I. Meyerson, Esq.
Joseph J. Heath, Esq.
Martin Stolar, Esq.
Elizabeth A. Gaynes, Esq.
Herbert X. Blyden
Jerome Rosenberg
William E. Jackson, Esq.
Michael A. Gurda, Esq.
Joshua J. Effron, Esq.
Richard Moot, Esq.
Irving C. Maghran, Jr., Esq.
George C. Mantzoros, Esq.
John H. Stenger, Esq.
Donald P. Berens, Jr., Esq.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

AKIL AL-JUNDI, a/k/a Herbert Scott Deane; BIG BLACK, a/k/a Frank Smith; ELIZABETH DURHAM, Mother and Legal Representative of Allen Durham, deceased; LITHO LUNDY, Mother and Legal Representative of Charles Lundy, deceased; THERESA HICKS, Widow and Legal Representative of Thomas Hicks, deceased; ALICE McNEIL, Mother and Legal Representative of Lorenzo McNeil, deceased; MARIO SANTOS, Mother and Legal Representative of Santiago Santos, deceased; JOMO SEKOU OMOWALI, a/k/a Eric Thompson; VERNON LaFRANQUE; ALFRED PLUMMER; HERBERT X BLYDEN; JOSEPH LITTLE; ROBIN PALMER; GEORGE "CHE" NIEVES; JAMES B. "RED" MURPHY; THOMAS LOUK; PETER BUTLER; CHARLES "FLIP" CROWLEY; WILLIAM A. MAYNARD, JR.; CALVIN HUDSON; KIMANTHI-MPINGO, a/k/a Edward Dingle; and KEN-DU, a/k/a Willie Stokes, on behalf of themselves and all others similarly situated,

CIV-75-132E

Plaintiffs,

-vs-

MEMORANDUM and ORDER

THE ESTATE OF NELSON A. ROCKEFELLER; RUSSELL A. OSWALD; WALTER DUNBAR; JOHN C. BAKER; A.C. O'HARA; JOHN MONAHAN; JOHN C. MILLER; LEON VINCENT; KARL PFEIL; ROBERT F. FISCHER; WIM VAN EEKEREN; VINCENT MANCUSI; JOHN DOES NOS. 1-100,

Defendants

A number of motions are presently pending in this civil rights action springing from the September 1971 quelling of an uprising at the Attica (N.Y.) Correctional Facility. The Estate of Nelson Rockefeller ("the Estate") has moved to decertify the plaintiff class, to compel the plaintiffs to respond to its discovery requests and for a scheduling order. Defendant Mancusi has moved for a partial dismissal of the Amended Complaint or, alternatively, for decertification of the plaintiff class as to those causes of action against him designated "Reprisals" and "Bad Faith Prosecutions." The plaintiffs seek a protective order in connection with the Estate's discovery requests and also seek a scheduling order. The Attorney General of the State of New York has moved for a protective order.

In a Memorandum and Order filed October 31, 1979 this Court granted the plaintiffs' motion for class action certification as to the first eight causes of action alleged in the Amended Complaint.[1] The class, approved under Fed.R.Civ.P. rule 23(b)(3), consists of all persons who were on September 13, 1971 inmates of the facility and who then were present in "D-yard." A subsequent finding that the plaintiffs' then counsel had failed to represent the plaintiffs adequately resulted in the October 27, 1980 revocation of the certification. This Court June 24, 1985 granted the plaintiff's motion for recertification of the class, as initially certified.

The Estate has moved to decertify the class again because the plaintiffs have failed to take steps to identify the individual class members and to direct to the class members the notice required under Fed.R.Civ.P. rule 23(c)(2). The plaintiffs have responded by indicating that it is for a court to decide the proper circumstances for the giving of such notice and to issue an order specifying the form and scope of the notice. Subsequent to the hearing of the Estate's motion to decertify, the plaintiffs submitted a proposed class notice. The Estate replied by indicating that the issue of the proposed notice had not been properly brought before

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[1] The plaintiffs denominated their amended pleading as their complaint. The Amended Complaint was filed September 11, 1975 and it will be referred to herein as the Amended Complaint.

153, 173 (1976) (relied upon in *Estelle* v. *Gamble*); *Furman* v. *Georgia*, 409 U.S. 238, 392-393 (1972) (Burger C.J., dissenting) (cited in *Gregg* v. *Georgia*); *Louisiana ex rel. Francis* v. *Resweber*, 329 U.S. 459, 463-464 (1947) ("abundantly clear" to Chief Justice Burger therefrom "that the Court was disapproving the wanton infliction of physical pain"); *see also Wilkerson* v. *Utah*, 99 U.S. 130, 135-136 (1878) (the "apparent seed," in Burger's evaluation, of the Eighth Amendment ban against "unnecessary cruelty'); *cf.*, *Rochin* v. California, 342 U.S. 165, 172-173 (1952) (law enforcement conduct that shocks the conscience" is violative of due process). The defendants here, while not having had the benefit of the instruction of *Whitley* v. *Albers* at the time of the riot, should intuitively have been aware of the rule to be gleaned therefrom. The law was not express in 1971, but it certainly was "apparent" within the meaning of qualified immunity jurisprudence. *See Anderson* v. *Creighton supra*, at 640.

The plaintiffs urge that Oswald's recommended approval of the Monahan plan to recapture Attica was a wanton act undertaken with callous disregard for its potential infliction of harm upon the rioting inmates and their hostages. Specifically, they allege that such plan failed to account for the "emotionally and racially charged atmosphere prevailing among the members of the assault force," failed to provide an adequate command structure to ensure the application of force would not become excessive or vindictive, failed to warn the inmates of the imminence of the assault or provide them with a means to surrender in the face thereof and, finally, failed to make allowance for adequate medical care for persons injured during the assault. Amended Complaint, ¶38. Monahan's plan for re-taking D-Yard, according to his account, was to involve two groups of seventy-five State Police officers converging upon D-Yard armed with .38 caliber handguns and shotguns loaded with "double-O" buckshot. Accompanying them was to be an indeterminately-numbered National Guard tear gas unit. Additionally, there were to be six sharpshooters on the C-Block roof armed with .270 caliber rifles to provide cover fire if needed. Prior to the assault, a National Guard helicopter was to drop tear gas in D-Yard, while behind the initial forces a twenty-five man State Police squad accompanied by two corrections officers was to enter D-Yard

for purpose of identifying and rescuing hostages. These men were armed comparably with the assault force. *See* Testimony of Monahan before the New York State Special Commission on Attica ("McKay Commission"), April 25, 1972, at p.1604 (endorsing the description given by another witness, at pp.1580-1591, as "very accurate"). Oswald's understanding of the plan to retake the prison was derived from discussions with Monahan as well as with Colonel John C. Miller and General A.C. O'Hara of the State Police. *See* Testimony of Russell G. Oswald before the Wyoming County (N.Y.) Grand Jury, September 18, 1972, at p.56. He understood that two groups of approximately thirty State Police officers would converge on D-Yard, that there were to be sharpshooters on rooftops with highpowered rifles to provide cover fire if needed, that prior to the assault there was to be a precision-dropping of tear gas by the National Guard by helicopter into D-Yard, and that approximately twenty State Police officers along with two corrections officers were to follow the assault force for purpose of identifying the hostages. *Ibid.* It appears, also, that Oswald gave some attention to providing for medical care, such not being part of Monahan's plan. He remembers discussing it with Mancusi and O'Hara, but ultimately medical care was "left for the National Guard to work out." *See* Oswald testimony before the McKay Commission, *supra*, April 28, 1972, at p.2723.

Neither Monahan's nor Oswald's recollection of the plan alludes to any warnings or ultimatums to be given the inmates respecting the imminency of a forceful retaking of the prison. Likewise neither makes any reference to a prospective chain of command once the State Police were loosed upon the facility. But, perhaps most tellingly, Oswald acknowledges that little attention was given by him to the special medical needs which might arise from such an operation and that, upon approving the assault plan, he did not have any understanding of the specific steps, if any, which had been or would be taken to provide medical care. Oswald's understanding of the plan was likewise vague concerning the size of the assault force which was to descend on D-Yard. Monahan, according to his testimony, devised a pair of 75-man units (150 men in all); Oswald anticipated only sixty men. If Monahan is to be believed

concerning the specifications of his own plan, either Oswald has misrecollected events, was woefully misinformed about this aspect of the plan or was recklessly indifferent to its specifics. This is a question of fact which cannot be resolved on Oswald's instant motion. If Oswald was, in fact, recklessly uncertain of the plan's parameters at the time he approved it or if he recklessly failed to consider issues impacting directly on the reasonableness of the plan, and if its going awry was a reasonably foreseeable result, then Oswald would properly share in the legal responsibility for the ensuing carnage. His recklessness, in this setting, would have been " 'so dangerous that [his] knowledge of the risk can be inferred.' " *Whitley* v. *Albers. supra*, at 321 (*quoting from Duckworth* v. *Franzen*, 780 F.2d 645, 652 (7th Cir. 1985)).

As for the second section of the Amended Complaint, regarding the plaintiff's' claims that they were subjected to torturous reprisals following the recapture of Attica, which barbarities the movants allegedly witnessed but took no action within their authority to halt – *see* Amended Complaint, ¶¶ 60-61 –, Oswald asserts his lack of personal involvement and has been joined in this argument by Mancusi and Pfeil. –

It is undisputed that a great many, if not the vast majority or all, of the Attica inmates were tortured by corrections officers after the prison was retaken and, further, it cannot reasonably be contended that such conduct was permissable under constitutional norms which were clearly-established even in 1971. A "gauntlet" was erected in one of the prison passageways whereby officials were positioned with clubs and prisoners were made to run the length of the passageway, receiving blows and racial epithets along the way. *See Inmates of Attica Correctional Facility* v. *Rockefeller*, 453 F.2d 12, 16 (2d Cir. 1971). In other separate instances of abuse, continuing from September 13th until at least September 16th, "[i]njured prisoners, some on stretchers, were struck, prodded or beaten with sticks, belts, bats or other weapons." *Id.*, at 18-19. Some inmates were "burned with matches, and others poked in the genitals or arms with sticks." *Id.*, at 19. The United States Court of Appeals for the Second Circuit, in considering the question of preliminary injunctive relief against reprisals back in

December 1971, characterized the corrections officers' conduct as "an orgy of brutality." *Ibid.* (accepting as true for its purposes the testimony with respect to physical abuse of prisoners). What is disputed respecting the instant movants is their participation in such conduct.

Oswald has given conflicting accounts whether he had been aware of the brutality and hence whether he could have reasonably been expected to employ his authority as the Commissioner of the State Department of Corrections to put a halt to it. Under oath in April 1972, Oswald stated that he had been informed about the gauntlet while still physically present at Attica, but inasmuch as such exercise was "practically" completed by such time and inasmuch as he believed "it was much like a fraternity hazing," he did nothing to stop it. *See* Oswald testimony before the McKay Commission, *supra*, April 28, 1972, at pp. 2720-2721. Eighteen years Oswald attested that he "neither participated in, ordered nor knowingly permitted" any of the alleged brutalities. Affidavit of Russell G. Oswald (sworn to April 5, 1990), ¶20. the inconsistency in these accounts is itself sufficient to establish a genuine issue of fact for trial as to Oswald's personal involvement in the reprisals. A supervising official's failure to remedy a constitutional infringement upon learning of it personally involves the official in the wrong. *Williams* v. *Smith*. 781 F.2d 319, 323 (2d Cir. 1986).

Mancusi also denies having participated in or having had personal knowledge of the reprisals. Affidavit of Vincent R. Mancusi (sworn to February 9, 1990), ¶¶ 9-10. The plaintiffs, however, have pointed to evidence placing Mancusi in the Attica "command center" at relevant times, which should have made him privy to reports of activities occurring in various areas of the prison. *See* McKay Report, *supra*, at p.432 & fn.4. Two of the plaintiffs have supplied affidavits, as well, attesting to having seen the Attica Superintendent personally witness his underlings commit brutalities. *See* Affidavit of Jerome Rosenberg (sworn to May 3, 1990), ¶¶ 7-8; Affidavit of Albert Bictory (sworn to May 3, 1990), ¶¶ 3, 5. As with Oswald, triable issues of fact remain respecting Mancusi's involvement in the reprisals.

Assistant Deputy Superintendent Pfeil denies having observed the torture of inmates as well, claiming not to have been in the locations where such activities are said to have occurred. Affidavit of Karl Pfeil (sworn to March 11, 1990), ¶ 3. Earlier inquiries into events, however, contradict this assertion — *see* McKay Report, *supra*, at p.447 (placing Pfeil in A-Yard September 13, 1971, the place and date of alleged brutalities) — and, again, two of the plaintiffs attest to having seen him witness reprisals. *See* Rosenberg affidavit, *supra*, ¶¶ 7-8; *Bictory* affidavit, *supra*, ¶¶ 3, 5. Judgment respecting Pfeil's liability for these reprisals must also await trial.

Finally as to the third section of the Amended Complaint, concerning the prosecutions brought against certain of the rioting inmates, both Mancusi and Oswald plausibly deny having had anything to do with such legal maneuvers (Pfeil, as noted, has already been dismissed respecting the third section of the Amended Complaint) - *see* Oswald affidavit, *supra*, ¶21; Mancusi affidavit, *supra*, ¶11, — and the plaintiffs have been mute in response. The third section suffers from a complete failure of proof and as such will be dismissed as to Oswald and Mancusi. *See Celotex Corp.* v. *Catrett*, 477 U.S. 317, 323 (1986).

Accordingly, it is hereby ORDERED that the third section of the Amended Complaint is dismissed as to Oswald and Mancusi but that these defendants' motions for summary judgment, along with that of defendant Pfeil, are otherwise denied.[5]

DATED: Buffalo, N.Y.
June 26, 1990

/s/John T. Elfvin
U.S.D.J.

[5] These defendants have alternatively requested a determination *in limine* respecting whether they had acted in their official or individual capacities in their alleged actions. Such requests are frivolous and rest upon a miscomprehension of immunity law. *See* footnote 7 hereinabove. They are likewise denied.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

AKIL AL-JUNDI, et al

Plaintiffs

- vs -

CIVIL NO. 75-132E

THE ESTATE OF NELSON A. ROCKEFELLER, et al

Defendants

NOTICE OF MOTION AND SUPPORTING AFFIDAVIT

The defendant, VINCENT MANCUSI, pursuant to the Federal Rules of Civil Procedure, hereby moves for orders granting the following relief:

1. Striking the purported substitution of plaintiffs' counsel;

2. Vacating this Court's order of February 24, 1981, which approved substitution of certain counsel;

3. Striking the Notices of Deposition and Requests for Admission served by plaintiffs; and,

4. Dismissing this action for failure of plaintiffs to prosecute pursuant to this Court's order dated October 27, 1980, as amended November 20, 1980.

The grounds in support of this motion are:

1. Plaintiffs have utterly failed to properly substitute new counsel and, consequently, the requests for admissions served upon defendant, VINCENT MANCUSI, as well as the notice of deposition, are improper and so fail to comply with this Court's order of October 27, 1980, as amended November 20, 1980, which directed that discovery be commenced as of February 24, 1981;

2. Since plaintiffs have failed to properly commence discovery within the time required, this action should be dismissed for failure to prosecute in accordance with this Court's prior orders.

PLEASE TAKE NOTICE that the undersigned will bring the above motion on for a hearing in Part II of this Court before the Honorable John T. Elfvin, United States Court House, Buffalo, New York, on April 6, 1981, at 9:00 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard.

PLEASE TAKE FURTHER NOTICE that defendant, VINCENT MANCUSI, requests oral argument on his motion.

DATED: Buffalo, New York
March 25, 1981

Yours, etc.,

DAMON, MOREY, SAWYER & MOOT

BY: /s/Brian P. Fitzgerald, Esq.
Brian P. Fitzgerald, Esq.

Attorneys for Defendant,
VINCENT MANCUSI
1600 Main Place Tower
Buffalo, New York 14202
(716) 856-5500

TO: ELIZABETH M. FINK
Attorney for AKIL AL-JUNDI, OJI KWESI SEKOU
and KIMANTHI M'PINGO
351 Broadway
New York, New York 10013

SUSAN CARPENTER
Attorney for Plaintiffs
SUNY at Buffalo, Law School
John Lord O'Brian Hall
Amherst Campus
Buffalo, New York

MARTIN R. STOLAR,
STOLAR, ALTERMAN & GULIELMETTI, P.C.
Attorneys for ALFRED PLUMMER
350 Broadway (Suite 1207)
New York, New York 10013

FRANK "BIG BLACK" SMITH
Pro Se
c/o Polly Eustis, Esq.
351 Broadway
New York, New York 10013

JEROME ROSENBERG
Pro Se
Ossining Correctional Facility
354 Hunter Street
Ossining, New York

ELIZABETH A. GAYNES, ESQ.
Attorney for JEMO JOKA OMAWALE
351 Broadway
New York, New York 10013

WILLIAM E. JACKSON, ESQ.
MILBANK, TWEED, HADLEY & McCLOY
Attorneys for ESTATE OF ROCKEFELLER
One Chase Manhattan Plaza
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JAECKLE, FLEISCHMANN & MUGEL
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MICHAEL A. GURDA, ESQ.
GURDA, GURDA & TATZ
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IRVING C. MAGHRAN, JR., ESQ.
Maghran, McCarthy & Flynn
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THOMAS M. WHALEN, III, ESQ.
COOPER, ERVING & SAVAGE
Attorneys for Defendant, BAKER
35 State Street
Albany, New York 12207

***

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

AKIL AL-JUNDI, et al

Plaintiffs

- vs -

CIVIL NO.
75-132

THE ESTATE OF NELSON A.
ROCKEFELLER, et al

Defendants

AFFIDAVIT IN SUPPORT OF MOTION

STATE OF NEW YORK)
COUNTY OF ERIE) SS
CITY OF BUFFALO)

BRIAN P. FITZGERALD, ESQ., being duly sworn, deposes and says:

1. I am an attorney at law duly admitted to practice law in the State of New York and am associated with the lawfirm of DAMON, MOREY, SAWYER & MOOT, attorneys for the defendant, VINCENT MANCUSI, herein. This affidavit is submitted in support of defendant, VINCENT MANCUSI's motion for the following relief:

(a) striking the purported substitution of plaintiffs' counsel;

(b) vacating this Court's order of February 24, 1981, apparently approving the substitution of counsel;

(c) striking the notices of deposition and requests for admissions served by plaintiffs; and,

(d) dismissing this action for failure to prosecute.

2. On August 4, 1980, only attorney ROBERT I. CANTOR, appeared as attorney of record in this case for the plaintiffs in response to this Court's own order to show cause why this action should not be dismissed. Since that time, no application of any kind has been made by Mr. Robert I. Cantor to withdraw as counsel in this case or to have counsel substituted for plaintiffs.

3. Despite this fact, various counsel now appear in this case for various named plaintiffs, but in only one instance do we have an affidavit of a named plaintiff that he has consented to the substitution of ELIZABETH FINK as his counsel. (See affidavit of AKIL Al-JUNDI, consenting to appointment of ELIZABETH FINK as his counsel annexed hereto as Exhibit "A".) All other attorneys have appeared in this action only by reference of their names on the notices of deposition and requests for admission filed with this Court on February 24, 1981.

4. The notices of deposition and requests for admissions indicate that ELIZABETH M. FINK is now the attorney for AKIL AL-JUNDI, KIMANTHI-M'PINGO and OJI KWESI SEKOU. However, there has been no affidavit or other papers filed by either M'PINGO or SEKOU authorizing this substitution. The named plaintiffs, BIG BLACK and JEROME ROSENBERG, now appear as pro se, but there has been no affidavit or other paper filed by either individual which would authorize this fact. ELIZABETH GAYNES now appears as attorney for JEMO JOKA OMOWALE, but there is no authorization filed by OMOWALE. ALFRED PLUMMER appears to be represented by MARTIN STOLAR, but no reason is offered as to why MARTIN STOLAR, who appeared as representing ALFRED PLUMMER on the amended complaint, has not appeared before this Court with respect to its Order to Show Cause or any other motions on prior occasions. Finally, SUSAN CARPENTER appears as attorney for "Plaintiffs", but there is absolutely no record or paper on file which would indicate who she represents.

5. Of the twenty seven named plaintiffs in this action therefore, only one, AL-JUNDI, has actually indicated his authorization to have an attorney represent him. Even in this instance, however, neither plaintiff, AL-JUNDI, or his attorney, ROBERT I. CANTOR, has properly substituted counsel.

6. Clearly, the discovery papers filed on February 24, 1981, should be stricken because no proper appearance has been made on behalf of any plaintiff.

7. There has been absolutely no showing made by plaintiffs or ROBERT I. CANTOR that notice of his withdrawal was served on any counsel of record or on his attorney as required by Local Rule 4(B).

WHEREFORE, defendant, VINCENT MANCUSI, respectfully requests that this Court issue an order striking the purported substitution of ELIZABETH FINK as counsel in this case, striking the notices of deposition and requests for admissions previously served, and dismissing this action for failure to prosecute.

/s/Brian P. Fitzgerald
Brian P. Fitzgerald

Subscribed and sworn to before
me this 25th day of March, 1981.

/s/Miriam F. Nostro
MIRIAM F. NOSTRO
Notary Public, State of New York

CERTIFICATE AND AFFIDAVIT OF SERVICE AND FILING

I, BRIAN P. FITZGERALD, ESQ., hereby certify and affirm that the annexed notice of motion and supporting attorney's affidavit on behalf of defendant, VINCENT MANCUSI, were filed with the Court and served upon all counsel at their respective addresses as shown above, on this 25th day of March, 1981.

/s/Brian P. Fitzgerald

Brian P. Fitzgerald

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

AKIL AL-JUNDI, et al.,

Plaintiffs,

-against-

75 Civ. 132

ESTATE OF NELSON A. ROCKEFELLER, et al.,

Defendants.

AFFIDAVIT SUBSTITUTION OF COUNSEL

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

AKIL AL-JUNDI, being duly sworn, deposes and says:

1. I am the lead named plaintiff in the above captioned matter and make this affidavit to advise this Court that Robert I. Cantor is not my attorney.

2. I would like to further advise this Court that Elizabeth M. Fink is my attorney and I request that she be so substituted for all purposes.

Further affiant sayeth not.

/s/Akil Al-Jundi
AKIL AL-JUNDI

Sworn to before me this
23rd day of February, 1981

/s/Polly Eustis
POLLY EUSTIS
NOTARY PUBLIC, STATE OF NEW YORK
No. 4616154, Qualified in New York County
Term Expires March 30, 1983

Exhibit A

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

AKIL AL-JUNDI, a/k/a Herbert Scott Deane, et al., Civ. No. 75-132E

Plaintiffs,

-vs-

THE ESTATE OF NELSON A. ROCKEFELLER, et al.,

Defendants.

MOTION OF DEFENDANT, VINCENT R. MANCUSI, TO DISMISS CERTAIN CAUSES OF ACTION AND OTHER RELIEF

Defendant, VINCENT R. MANCUSI, pursuant to Rules 12 and 23 FRCP moves for an Order:

1. Dismissing as to Defendant Mancusi those causes of action designated, "*Reprisals*" and "*Bad Faith Prosecutions*".

2. In the alternative, decertifying those causes of action designated, "*Reprisals*" and "*Bad Faith Prosecutions*".

3. Denying all claim of privilege by the Attorney General of the State of New York with respect to Attica documents which have previously been made available to or examined by Plaintiffs' counsel.

The grounds for the motion are:

1. Members of the Plaintiff class are collaterally estopped and barred from asserting the allegations with respect to *"Reprisals"* in the Fifth through Eighth causes of action against Defendant Mancusi. The allegations of reprisals were or should have been raised in the *Walker v. Mancusi* and *Inmates of Attica Correctional Facility v. Rockefeller I* (1971) and *II* (1973).

2. Requiring Defendant Mancusi to defend against the same and additional charges of reprisals now, fourteen years after the event, constitutes a denial of due process.

3. The *"Bad Faith Prosecutions"* causes of action Ninth through Eleventh were dismissed against Defendant Robert F. Fischer, the Special Prosecutor in charge of the prosecutions. No further basis remains in the allegations of the Amended Complaint to continue these causes of action against the Defendant Vincent R. Mancusi who was a witness, not a member of the prosecutorial staff in such proceedings. The bad faith prosecutions are also barred by the second *Inmates of Attica v. Rockefeller II* (1973) litigation.

4. The present class certification cannot apply to the "Reprisals" causes of action. The amended complaint, on its face, states in Paragraphs 61 and 64 that the reprisals causes of action are only against "certain members" of the class.

5. The Attorney General has waived any privilege with respect to Attica documents which were made available for examination by Plaintiffs' counsel. Documents which Plaintiff's counsel has examined and segregated, defense counsel may examine and copy.

DATED: Buffalo, New York
January 13, 1986

Yours, etc.,
MOOT & SPRAGUE

By /s/ Richard E. Moot

RICHARD E. MOOT, ESQ.
Attorneys for the Defendant,
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CERTIFICATE OF SERVICE AND FILING

I, RICHARD E. MOOT, ESQ., counsel for the Defendant, Vincent R. Mancusi, certify that the Notice of Motion of Defendant, Vincent R. Mancusi, to Dismiss Certain Causes of Action and Other Relief with Supporting Affidavits of Vincent R. Mancusi and Theresa A. Smyth and the Supporting Memorandum of Law were served upon all counsel of record and thereafter filed with the Clerk of the United States District Court for the Western District of New York.

DATED: Buffalo, New York
January 13, 1986

/s/ Richard E. Moot
RICHARD E. MOOT, ESQ.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

AKIL AL-JUNDI, a/k/a Herbert Scott Deane, et al., Civ. No. 75-132E

Plaintiffs,

-vs-

THE ESTATE OF NELSON A. ROCKEFELLER, et al.,

Defendants.

AFFIDAVIT OF VINCENT R. MANCUSI IN SUPPORT OF MOTION TO DISMISS CERTAIN CAUSES OF ACTION AND FOR OTHER RELIEF

STATE OF FLORIDA)
COUNTY OF LEE) ss:

I, VINCENT R. MANCUSI, make this affidavit in support of the motion to dismiss certain causes of action and other relief and further state:

1. I was Warden at the Attica Correctional Facility from September of 1965 through March of 1972. During and following the uprising at the Attica Correctional Facility, I was interviewed, gave written statements, testified before various commissions and before various courts. This included being interviewed by television, by magazine, and by newspaper reporters as well as giving written statements to the Attorney General's Office, to the State Police, and to the Jones Committee of the New York State Assembly.

2. In addition, I was deposed in the property destruction cases and testified before this Court in the *Inmates* case, before the McKay Commission, before the Pepper Committee in the House of Representatives, before the Jones Committee and before the Grand Jury in Warsaw.

3. In repeated cases, I was named as defendant and accused of reprisals, including the segregated confinement of prisoners, following the retaking of the Attica Correctional Facility. To the best of my knowledge, no judgment has ever been rendered against me with regard to reprisals. I have been furnished a copy of the affidavit by Theresa Smyth which I believe fairly describes these prior suits against me.

4. Moreover, I am advised that on December 31, 1976, Governor Carey issued an executive order terminating all further proceedings against state officials and employees for any criminal wrongdoing.

5. Extensive investigations, two grand jury inquiries and repeated trials have failed to establish that I, at any time, was responsible for the allegations of reprisals which are again alleged in this action.

6. Prior to the Attica uprising, I placed certain inmates in segregated confinement following an uprising in which the participation of that individual inmate was unclear. Specifically, in November of 1970, a state emergency was declared at the Auburn Correctional Facility and all inmates were keylocked. During this same month, four inmates, by the names of Carter, Tanner, Thompson and Johnson, were transferred to the Attica Correctional Facility and immediately placed in segregation because their precise roles in the Auburn disturbance were unclear. This segregation of inmates was questioned, upheld by the District Court and subsequently affirmed by the U.S. Court of Appeals. *Carter v. McGinnis*, 320 F. Supp. 1092 (W.D.N.Y. 1970), *aff'd*, 460 F.2d 1406 (2nd Cir. 1972).

7. Following the Attica uprising, Attica inmates were intentionally segregated and placed in confinement based on their particular participatiqn in the Attica uprising. Once again, the segregated confinement of inmates following an uprising was questioned, upheld by the District Court and subsequently affirmed by the United States Court of Appeals. *United States ex rel. Walker v. Mancusi*, 338 F. Supp. 311 (W.D.N.Y. 1971), *aff'd*, 467 F.2d 51 (2nd Cir. 1972) and *Inmates of Attica Correctional Facility v. Rockefeller*, 453 F.2d 12 (2nd Cir. 1971).

8. With limited means, I have not had the assistance of personal counsel with respect to the alleged accusations made against me except for various deputy attorney generals and Messrs. Stenger and Moot who, at different times, have been assigned by the State of New York to represent me. Since my retirement in 1972, I have had to live modestly also because of limited means and am unable to satisfy even a single plaintiff's claim for relief in the amount of $1,000,000.00 for compensatory damages alone.

9. Moreover, I am now 71 years of age and have been retired for over thirteen years. Any written documents, which were prepared in connection with my position as Warden of Attica, I left at the prison when I retired since I considered it the property of the State of New York. I have kept no personal records or documents of the events at Attica during or following the uprising. Now, almost fourteen years afterwards, the details of these events have become quite elusive to me. Although I do recall some things with particularity, I can no longer recall the details of this time except in general terms.

10. The passage of time, which is over fourteen years, and the unavailability of documents and witnesses has now made it impossible for me to again fully and fairly prove my defense to these charges. I believe that I will be denied the due process of law if required to attempt a defense to those charges again at this late date.

DATED: January 13, 1986

/s/ Vincent R. Mancusi
VINCENT R. MANCUSI

Subscribed and sworn to before
me this 13th day of January, 1986

/s/ Linda G. Morgan
NOTARY PUBLIC

NOTARY PUBLIC STATE OF FLORIDA
MY COMMISSION EXP. JULY 9, 1989
BONDED THRU GENERAL INS. UND.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

AKIL-AL JUNDI, a/k/a Herbert Scott Deane, et al., Civ. No. 75-132E

Plaintiffs,

-vs-

THE ESTATE OF NELSON A. ROCKEFELLER, et al.,

Defendants.

AFFIDAVIT IN SUPPORT OF MOTION TO DISMISS CERTAIN CAUSES OF ACTION AS AGAINST VINCENT R. MANCUSI AND FOR OTHER RELIEF

STATE OF NEW YORK)
COUNTY OF ERIE) ss:

I, Theresa A. Smyth, make this affidavit in support of the Motion to Dismiss Certain Causes of Action as Against Vincent R. Mancusi and for other relief and further state:

1. I am legal assistant to Richard E. Moot, Esq., counsel for defendant Vincent R. Mancusi in this action.

2. Under the direction and supervision of Richard E. Moot, I did library and Lexis computer-assisted research to identify all actions arising out of the 1971 Attica uprising and the names of all plaintiffs having brought such actions. Thereafter, I limited this search to those actions naming Vincent R. Mancusi as a defendant.

3. With regard to the actions naming Mr. Mancusi as a defendant, the search identified, in addition to the instant *Al-Jundi* action, *Inmates of Attica Correctional Facility v. Rockefeller I*, 453 F.2d 12 (2nd Cir. 1971), *Inmates of Attica Correctional Facility v. Rockefeller II*, 477 F.2d 375 (2nd Cir. 1973), *United States ex rel. Walker v. Mancusi*, 467 F.2d 51 (2nd Cir. 1972) and *Nieves v. Oswald*, 498 F.2d 802 (2nd Cir. 1974). Of these actions, both *Al-Jundi* is and *Walker* was a class action. The class in *Walker* was certified as including all inmates of the Attica Correctional Facility. The present class in *Al-Jundi* is certified as including all inmates present in D Yard at the time of the uprising.

4. In *Al-Jundi*, pursuant to this Court's Order of 7/21/81, there are sixteen named plaintiffs and, pursuant to this Court's Order of 10/30/79, five named defendants (See Exhibit A). Eight of these same sixteen plaintiffs have, in other actions, including the above-referenced ones, named Mr. Mancusi as a defendant and sought relief in various courts, including the United States District Court for the Western and Southern Districts and the United States Court of Appeals for the Second Circuit. The relief requested included judgment against Mr. Mancusi by reason of alleged wrongdoing and reprisals with respect to the Attica uprising.

5. For example, Herbert X. Blyden was a named plaintiff in *Inmates I* (See Exhibit B). Frank Smith and Edward Dingle were named plaintiffs in *Inmates II* (See Exhibit C). Joseph Little was a named plaintiff in *Nieves* (See Exhibit D). Peter Butler was a named plaintiff in *Inmates I* and *Inmates II* (See Exhibits B and C). Both George Nieves and Raymond Sumpter were named plaintiffs in *Nieves* and *Walker* (See Exhibits D and E). Lastly, Calvin Hudson was a named plaintiff in *Walker* (See Exhibit E). Mr. Mancusi was a named defendant in each of these actions.

6. Quotations from these cases, with respect to Mr. Mancusi, are set forth for the convenience of the Court as follows:

He (Judge Curtin) found that although racial slurs, nighttime harassment, threats and other improper conduct had continued, there was almost no evidence of physical abuse or brutality after September 14th, and that the Superintendent Mancusi and others in charge had not countenanced the physical abuses or threats on the part of their subordinates.

Inmates of Attica Correctional Facility v. Rockefeller I 453 F.2d 12, 19 (2nd Cir. 1971).

Superintendent Mancusi, on the other hand, countered that neither he nor any members of his staff had engaged in the interrogation of inmates and that he had ordered his staff not to engage in such interrogation. As far as he knew, the only interrogation of inmates conducted at Attica was that carried on by Deputy Attorney General Fischer and his staff and by the inmates' own counsel.

Id. at 18.

The Superintendent (Mancusi) reviewed each case, informed each inmate of the evidence against him and gave him the opportunity to consent to continued restricted confinement or to reply to the evidence against him. Substantial evidence of good cause for continued segregated confinement was found as to all except four prisoners who were released to the general population.

United States ex rel. Walker v. Mancusi, 467 F.2d 51, 53 (2nd Cir. 1972).

7. In short, Herbert X. Blyden, Frank Smith, Edward Dingle, Joseph Little, Peter Butler, George Nieves, Raymond Sumpter, and Calvin Hudson have made allegations of wrongdoing and reprisals, arising from the 1971 Attica uprising, against Mr. Mancusi and they have been litigated. Now, these same plaintiffs

come once again to litigate allegations of wrongdoing and reprisals, arising from the 1971 Attica uprising, against Mr. Mancusi.

8. Moreover, in my initial search, I identified sixteen actions in the New York State Court of Claims (See Exhibit F). I have been able to examine five of these complaints and each alleges general wrongdoing on the part of the State of New York and Mr. Mancusi under which the plaintiff has an opportunity to prove wrongful reprisals.

9. Two of these Court of Claims claimants have, in other actions, sought relief against Mr. Mancusi as named plaintiffs. Specifically, Gilberto Gonzales was a named plaintiff in *Inmates I* (See Exhibit B) and Jomo Joko Omowale is now a named plaintiff in *Al-Jundi* (See Exhibit A). However, all of these claimants in the New York State Court of Claims have sought relief before against Mr. Mancusi as part of the class in the *Walker* class action and are now seeking relief again against Mr. Mancusi as part of the class in the *Al-Jundi* action presently before this Court.

/s/ Theresa A. Smyth
Theresa A. Smyth

Subscribed and sworn to before me,
this 12th day of January, 1986

/s/ Victoria M. Kuzenko
Notary Public

VICTORIA M. KUZENKO
Notary Public, State of New York
Qualified in Erie County
My Commission Expires March 30, 1987

Al-Jundi v. Estate of
Nelson A. Rockefeller,

Civ. No. 75-132E

Plaintiffs

Akil Al-Jundi, a/k/a Herbert Scott Deane
Big Black, a/k/a Frank Smith
Jomo Joko Omowale, a/k/a Eric Thompson
Alfred Plummer
Herbert X. Blyden
Joseph Little
Robin Palmer
George "Che" Nieves
Peter Butler
Charles "Flip" Crowley
Calvin Hudson
Kimanthi M'Pingo, a/k/a Edward Dingle
Kendu Haiku, a/k/a Willie Stokes
Oojikwesi Sekou, a/k/a Chris Reed
Jerome Rosenberg
Raymond Sumpter

Defendants

Estate of Nelson A. Rockefeller
Russell G. Oswald
John Monahan
Vincent Mancusi
Karl Pfeil
John Does, Nos. 1-100

EXHIBIT A

Inmates of Attica Correctional Facility v. Rockefeller I, 453 F.2d 12 (2nd Cir. 1971)

Plaintiffs

Mariano Gonzales
Peter Butler
Herbert X. Blyden
Richard Clark
Roger Champen
William Jackson
Ernest Holley

Defendants

Nelson Rockefeller
Russell G. Oswald
Vincent Mancusi

EXHIBIT B

Inmates of Attica Correctional Facility v. Rockefeller II, 477 F.2d 375 (2nd Cir. 1973)

Plaintiffs

Peter Butler
Richard X. Clark
Roger Champen
Gary R. Haynes
Lawrence Killebrew
David R. Smith
Frank Smith
Edward Dingle
Robert L. Robinson
Wayne Trimmer
Elizabeth Durham for Allen Durham
Arthur O. Eve

Defendants

Nelson A. Rockefeller
Russell Oswald
Walter E. Dunbar
Vincent R. Mancusi
Henry Williams
John and Richard Doe
Robert E. Fischer
Louis Lefkowitz
Judge Carmen
R. Kenneth Schroeder, Jr.
Edmund Maxwell

EXHIBIT C

Nieves v. Oswald,
498 F.2d 802 (2nd Cir. 1974)

Plaintiffs

George (Che) Nieves
Raymond Sumpter
Stephen Merkel
Jacques Roberts
Henry Pelow
William Ortiz
Andres Figueroa
Joseph Little
Clarence Hicks

Defendants

Russell Oswald
Vincent R. Mancusi

EXHIBIT D

United States ex rel. Walker v. Mancusi,
338 F. Supp. 311 (W.D.N.Y. 1971), *aff'd*, 467
F.2d 51 (2nd Cir. 1972)

Plaintiffs

Harold Walker
Wayne Trimmer
Raymond Sumpter
Steven Garrett
Harry Kyle
Thomas Lewis
Richard Fisher
James Murphy
Calvin Hudson
Richard J. Wright
Edward Todd
William R. Broome
George (Che) Nieves
Rich Bilello
Rafael (Ray) Soto
Richard Jones
Charles Colvin
Verdell Turner
Stephen Merkel
Allah Dihu
Bernard Stroble
John Delgado
Thomas Frozier
Jacque Roberts
William Bennett
Wilbur Johnson
Henry Pelow
Anthony Williams
Michael Stranys
Phillip Geryea
William Schappell
Peter Rodriquez
Luis M. Quintana
Steven Barney
Clarence Hunter

Defendant

Vincent R. Mancusi

EXHIBIT E

N.Y.S. Court of Claims
Attica Actions

Prince v. State of New York (No. 54953)
Jones v. State of New York (No. 54960)
Wright v. State of New York (No. 55052)
McCoy v. State of New York (No. 57003)
Tarallo v. State of New York (No. 57158)
McPhilomy v. State of New York (No. 57167)
Kerber v. State of New York (No. 57619)
Walls v. State of New York (No. 57710)
Gray v. State of New York (No. 57775)
Picket v. State of New York (No. 57777)
Lopez v. State of New York (No. 57866)
Buster v. State of New York (No. 58355-A)
Gonzales v. State of New York (No. 58865)
Miles v. State of New York (No. 58941)
Louk v. State of New York (No. 59112)
Omowale v. State of New York (No. 59593)

EXHIBIT F

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

AKIL AL-JUNDI, a/k/a Herbert Scott Deane, et al.,

Plaintiffs,

-vs- Civ. No. 75-132E

THE ESTATE OF NELSON A. ROCKEFELLER, et al.,

Defendants.

Memorandum On Behalf Of Defendant, Vincent R. Mancusi, In Support Of Motion To Dismiss Certain Causes Of Action And Other Relief

Introductory Statement

Three motions on behalf of the Defendant, Vincent R. Mancusi, are before this Court. Two of the motions, those of October 24, 1985 and December 23, 1985 seek an extension of time to examine the Attica documents. Counsel for Defendant Mancusi has been assigned the task on behalf of all Defendants of overseeing the examination, numbering, indexing and copying of the Attica documents. Although nominally brought on behalf of Defendant Mancusi, the requested extension is for the benefit of all Defendants.

The first motion of October 24, 1985 related to the Room 4502 documents covered by paragraphs 1 through 6 of the Stipulation and Order of the Court of August 5, 1985. The second motion to extend the time for examination of Attica documents of December 23, 1985 related to the Main Room documents, covered by paragraphs 7 through 12 of the Stipulation and Order of the Court of August 5, 1985.

Counsel for the Plaintiffs has opposed these motions and filed an additional motion for a Rule 16 Order setting a schedule for pretrial discovery and date for trial together with a motion for a protective order pursuant to Rule 26.

In response to the Plaintiffs' motion, Defendant Mancusi, on January 13, 1986, moves for an Order:

> 1. Dismissing as to Defendant Mancusi those causes of action designated "*Reprisals*" and "*Bad Faith Prosecutions*".
>
> 2. In the alternative, decertifying those causes of action designated, "*Reprisals*" and "*Bad Faith Prosecutions*".
>
> 3. Denying all claims of privilege by the Attorney General of the State of New York with respect to Attica documents which have previously been made available to or examined by Plaintiffs' counsel.

With respect to the Plaintiffs' motion and the discovery and privilege questions raised by all the parties, Defendant Mancusi relies upon the motions, affidavits and memoranda of the other Defendants. Additionally, Defendant Mancusi's relies upon the affidavits of Richard E. Moot, Esq. of October 24, 1985, November 7, 1985 and December 17, 1985 which set forth the difficulties that the Defendants have experienced with respect to the examination of Attica documents. From these affidavits, it appears that the matter of the Attorney General's unfounded claim of privilege is quite simple. Those documents, which the Attorney General has permitted Plaintiffs' counsel to examine, Defendants' counsel may also examine. Documents which both parties to the litigation have examined may be copied for use on depositions and in preparation for trial. The question is factual, not legal, and is fully covered in paragraphs 5 and 6 of the Moot Affidavit of December 17, 1985. Admissibility or the form of an appropriate order of confidentiality may await the trial.

The Present Memorandum

The present Memorandum is concerned solely with two narrow questions:

> 1. Is the individual Defendant, Mancusi, entitled to dismissal of those causes of action designated "*Reprisals*" and "*Bad Faith Prosecutions*" upon the grounds that the Plaintiffs have had a full and fair opportunity, in prior litigation, to prove those allegations?
>
> 2. Should the causes of action designated "*Reprisals*" and "*Bad Faith Prosecutions*" be decertified as class actions on the grounds that the complaint itself and the undisputed facts are that such causes of action only relate to "certain members" of the class?

Mancusi Motion to Dismiss
"Reprisals" and "Bad Faith Prosecutions" Allegations

In 1971, Judges Curtin and Henderson, on repeated occasions, heard Attica testimony. *United States of America ex rel. Walker v. Mancusi*, 338 F. Supp. 311 (W.D.N.Y. 1971) and *Inmates of Attica Correctional Facility v. Rockefeller I*, 453 F.2d 12 (2nd cir. 1971). Additional testimony was taken in the Southern District of New York *Inmates of Attica Correctional Facility v. Rockefeller II*, 477 F.2d 375 (2nd Cir. 1973). When the events were fresh and the testimony contemporary and accurate, Defendant Mancusi was twice exonerated from any culpability with respect to reprisals and bad faith prosecutions.

The charges of "physical abuse, 'punishment', verbal abuse, racial slurs, threats, destruction of property and other harm upon the plaintiffs" and placing "at least 100 members of the plaintiff class in segregated cells" as detailed in paragraphs 59 and 60 of the present Amended Complaint, were twice considered by the Court of Appeals and twice Defendant Mancusi was exonerated. In *Inmates of Attica Correctional Facility v.*

Rockefeller I, the Second Circuit, referring to the findings of Judge Curtin, said:

> "He (Judge Curtin) found that although racial slurs, nighttime harassment, threats and other improper conduct had continued, there was almost no evidence of physical abuse or brutality after September 14th, and that the Superintendent Mancusi and others in charge had not countenanced the physical abuses or threats on the part of their subordinates."

Inmates of Attica Correctional Facility v. Rockefeller, 453 F.2d 12, 19 (2nd Cir. 1971). The question of bad faith prosecutions was the subject matter of *Inmates of Attica Correctional Facility v. Rockefeller II*, 477 F.2d 375 (2nd Cir. 1973). Dismissal of the prisoners' claims against State officials was dismissed by the Second Circuit with the statement, "We agree that the extraordinary relief sought cannot be granted in the situation here presented." *Id.* page 377.

The subject of segregation and improper confinement alleged in sub-paragraph (f) of paragraph 60 of the present Complaint was the subject of appeal in *Unites States ex rel. Walker v. Mancusi*, 467 F.2d 51 (2nd Cir. 1972) where the Court found, at page 53:

> "The Superintendent (Mancusi) reviewed each case, informed each inmate of the evidence against him and gave him the opportunity to consent to continued restricted confinement or to reply to the evidence against him. Substantial evidence of good cause for continued segregated confinement was found as to all except four prisoners who were released to the general population."

This Court, in its prior Decision of October 30, 1979, made the traditional distinction between res judicata and collateral estoppel; res judicata being a final judgment on the merits of an action, *Cromwell v. County of Sac*, 94 U.S. 351, 352, 24 L.Ed.

195 (1876), and collateral estoppel precluding relitigation of a decided issue of fact or law necessary to the prior judgment (issue preclusion), *Montana v. United States*, 440 U.S. 147, 153, 99 S.Ct. 970, 973, 95 L. Ed.2d, 210 (1979).

In the same Order, this Court invited the parties to raise collateral estoppel to exclude the issues previously litigated in cases arising out of Attica. Defendant Mancusi has done so with respect to reprisals and bad faith prosecutions. The Smyth Affidavit sets forth such prior Attica cases with attached exhibits of the named inmates and Defendants, showing Defendant Mancusi as a party in each. Unquestionably, the issue of reprisals was litigated in those cases.

In its reference to collateral estoppel issues, the Court, in its Decision of October 30, 1979, cited *Mastracchio v. Ricci*, 498 F.2d 1257 (1st Cir. 1974), *cert. denied*, 420 U.S. 909 (1975) which holds that:

> "It now appears well established that when a civil rights action is brought in federal court which presents the same issue as was decided in a prior state civil action, that prior state judgment may have a collateral estoppel (or res judicata) effect upon the federal suit . . . [and] the same is true if the prior civil action was in federal court . . ."

Mastracchio, supra, 1259-1260.

The First Circuit states further that "the same principles have been applied by a number of courts to the situation where the prior judgment is a state criminal conviction . . .", and cites various Court of Appeals opinions to the same effect. *Mastracchio, supra*, 1260.

The United States Supreme Court, in *Allen v. McCurry*, 449 U.S. 90, 101 S.Ct. 411, 66 L.Ed.2d, 308 (1980), certified the *Mastracchio* rule. McCurry, after being convicted in a state court criminal proceeding, brought a §1983 action grounded in a violation of his Fourth Amendment rights.

In referring to the distinction between res judicata and collateral estoppel made in *Cromwell* and *Montana*, respectively, the Supreme Court enumerated the underlying theories which justify the doctrines of res judicata and collateral estoppel as: relieving parties of the cost and vexation of multiple lawsuits, conserving judicial resources, encouraging reliance on adjudication by preventing inconsistent decisions, and promoting comity between state and federal courts. *Allen*, *supra*, 449 U.S., at 95-96, 101 S.Ct., at 415. Certainly, these arguments can be advanced to support the application of collateral estoppel in *Al-Jundi*.

While acknowledging that "every Court of Appeals that has squarely decided the question has held that collateral estoppel applies when §1983 plaintiffs attempt to relitigate in federal court issues decided against them in state criminal proceedings", the Supreme Court held that "there is, in short, no reason to believe that Congress intended to provide a person claiming a federal right an unrestricted opportunity to relitigate an issue already decided in state court simply because the issue arose in a state proceeding in which he would rather not have been engaged at all." *Allen*, 449 U.S., at 102-105, 101 S.Ct., at 419-420.

The question of "*Bad Faith Prosecutions*" stands on a separate and distinct factual footing. The Court, in its October 30, 1979 Order, dismissed the bad faith prosecutions against the Special Prosecutor, Robert Fischer. Nothing in the Complaint or prior Attica litigation suggests in any way that Defendant Mancusi, who retired in March 1972, six months following the uprising, was in any way responsible for the bad faith prosecutions.

Furthermore, the Second Circuit, in *Inmates of Attica Correctional Facility v. Rockefeller I*, 453 F.2d 12, 18 (2nd Cir. 1971), found:

> "Superintendent Mancusi, on the other hand, countered that neither he nor any members of his staff had engaged in the interrogation of inmates and that he had ordered his staff not to engage in such interrogation. As far as he knew, the only interrogation of

> inmates conducted at Attica was that carried on by Deputy Attorney General Fischer and his staff and by the inmates' own counsel."

With respect to Defendant Mancusi's individual and narrow motion for dismissal, the rationale and the test is clear:

> "To preclude parties from contesting matters that they have had a full and fair opportunity to litigate, protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions."

Montana v. U.S., 99 S.Ct. 970, 973 (1979).

The conclusion is equally clear. Plaintiffs have had more than a full and fair opportunity in prior litigation to prove the allegations of "*Reprisals*" and "*Bad Faith Prosecutions*".

Due Process

The same considerations of due process which supported Governor Carey's findings and grant of amnesty on December 31, 1976 also support Defendant Mancusi's motion for dismissal.

For 13 years, Mr. Mancusi has been retired. He has testified in repeated cases, extensive investigations., two Grand Jury inquiries and repeated special inquiries. All of his records and notes have been the property of the State and have not been properly preserved. As Governor Carey's proclamation states:

> "These independent investigations . . . have documented: . . . the failure to properly plan for the preservation of evidence and to properly collect it once the retaking had ended."

(See Page 2 of Exhibit A to this Memorandum.)

Class Certification

In the alternative, Defendant Mancusi has moved to decertify the "*Reprisals*" causes of action. The Court's Order of October 30, 1979 certified the class in the present case for the first eight causes of action, "*The Plan*", "*The Assault*" and "*Reprisals*" as:

> "The class shall be comprised of all persons who were, on September 13, 1971, inmates of the Attica Correctional Facility, Wyoming County, New York, and who were present in D-Yard of Attica on such date."

After decertifying the class for inadequate representation, the class was recertified by the Court's Order of June 24, 1985.

Although such class certification may, in subsequent testimony, be sustained with respect to the allegations of the present amended complaint dealing with "*The Plan*" and "*The Assault*", such certification cannot be sustained with respect to "*Reprisals*". Like "*Bad Faith Prosecutions*", which the Court has correctly excluded from the class certification, the question of "*Reprisals*" is individual and not a matter of class wrong or certification. Some of the prisoners in D-Yard on the day of the uprising may have participated in the uprising; others may not have. With respect to some subsequent segregated confinement, disciplinary action may have been appropriate. With respect to others not participating in the uprising but present in the yard at the time, subsequent disciplinary proceedings would be inappropriate. Class certification, with respect to the remaining charges against Defendant Mancusi, "*Reprisals*" and "*Bad Faith Prosecutions*", are not warranted.

The question was considered in *Inmates of Attica Correctional Facility v. Rockefeller I*, 453 F.2d 12, 24 where the Court held:

> "In regard to the counsel claim, we affirm the District Court's denial of the Plaintiffs' application to maintain the suit as a class action. As to that issue, Plaintiffs

> have failed to satisfy certain essential requirement prescribed by Rule 23 F.R. Civ. P., as conditions precedent to the prosecution of a lawsuit as a class suit. Although Plaintiffs present some common questions of law and fact, it is by no means clear that their claims are typical or representative of all members of the purported class, i.e., the Inmates of Attica, or that they will adequately protect the interests of all inmates. On the contrary, sharp conflicts of interest exist between inmates. Some did not participate at all in the uprising, while others did. Some may be threatened with State prosecution, while others will not. Some, therefore, may be called upon to testify with respect to criminal acts committed by others, and may even desire to do so, while others may desire the opposite."

In accord with the decisions which have considered the question of class certification for reprisals, Plaintiffs' counsel, in the present Amended Complaint, concedes that not all members of the present recertified class, inmates in D-Yard on September 13, 1971, were the subject of reprisals. Paragraph 61 expressly states: "*Certain* members of the class were isolated and singled out for special summary punishment, reprisals and retaliation . . ." Further, in paragraph 64, the Amended Complaint alleges: "*Certain* members of the class were denied parole on technical grounds and denied good time maliciously and as a reprisal for being in D-Yard." With respect to physical injury and therefore, the denial of appropriate care, the Amended Complaint expressly states that the alleged wrongs refer to only one-half the class. Paragraph 67 alleges: "The cruel and inhuman reprisals against Plaintiff class resulted in physical wounds to one-half the class. The wounds included abrasions, contusions, lacerations, fractured ribs, broken elbows, a broken arm, nose and infected skull."

Both the prior considerations of the class-action question by the courts and the express allegations of the present amended complaint require the same result. The present class certification cannot apply with respect to the remaining allegations against Defendant Mancusi which are limited to "*Reprisals*" and "*Bad Faith Prosecutions*".

Conclusion

It is time to put the remaining charges of "*Reprisals*" and "*Bad Faith Prosecutions*" against Defendant Mancusi to rest. At the time of the events, Warden Mancusi testified forthrightly and completely at length and upon repeated trials and other occasions with respect to the Attica events.

Plaintiffs have had more than a full and fair opportunity to prove the limited and remaining allegations of "*Reprisals*" and "*Bad Faith Prosecutions*" on the part of the retired Warden, Vincent R. Mancusi.

The District Courts and Court of Appeals found no acts of "*Reprisals*" or "*Bad Faith Prosecutions*" which would warrant the present suit.

The Plaintiffs' oft-delayed, on-again, off-again twelve-year prosecution of their complaint against the long-ago retired Warden should now be dismissed.

DATED: Buffalo, New York
January 13, 1986

Respectfully submitted,

MOOT & SPRAGUE

By: /s/Richard E. Moot

RICHARD E. MOOT, ESQ.
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Of Counsel:

Mark C. Butler, Esq.

THE NEW YORK TIMES
December 31, 1976
P. A10

"TEXT OF THE STATEMENT BY CAREY ON INQUIRIES INTO ATTICA UPRISING"

(Following is the text of a statement by Gov. Carey on the investigations into the uprising at Attica in 1971:)

The Governor of the State of New York has the constitutional responsibility to "take care that the laws are faithfully executed." That responsibility places a constitutional imperative upon the Governor to insure equal justice for all citizens of the state. No government can command the confidence and respect of its people without a first commitment to the principle and practice of evenhanded justice.

The facts and circumstances recounted in the reports of Special Deputy Attorneys General Meyer and Scotti make it irrefutably clear that the state, through its highest officials, failed abysmally in upholding this principle in the handling of Attica investigation and prosecution in the first half of this decade. Due to insensitivity to their constitutional responsibilities, equal justice by way of further prosecutions is no longer possible.

Two independent investigators that I caused to be appointed have documented the one-sided nature of the prosecutions. The failure to take early and vigilant action to insure a vigorous, thorough and impartial investigation and prosecution of *all* crimes committed during the tragic five days in September renders futile any further attempts to secure even a semblance of equal justice now through further prosecution. These independent investigations and another have documented:

– The failure to properly plan the assault and to properly instruct the men (Meyer Report p. 8; McKay pp. 341-366).

— The failure to properly plan for the preservation of evidence and to properly collect it once the retaking had ended (Meyer Report p. 8, 51; Scotti's statement to the court 2/26/76 p. 6-7).

— The failure to properly budget and administer the investigation (Meyer Report p. 9, 75-77).

— The failure to perceive these deficiencies at the outset of the investigation and to take whatever action could have been taken to develop evidence pertaining to possible crimes by law-enforcement personnel (Meyer Report p. 48, 54, 119-20; Scotti's statement to the court 2-26/76 p. 6).

'Abundantly Clear'

The two independent investigations have made it abundantly clear to me that these repeated failures have effectively precluded the possibility now of bringing to justice, by trial or disciplinary action, any armed personnel who were misdirected or abused their authority in the retaking of the facility and rehousing of the inmates.

During the months since I received these reports, I have personally read, reviewed and analyzed all of the materials with respect to the Attica uprising, retaking, investigations and prosecutions. In so doing, I have come to the most distressing, indeed the most disappointing moment in my tenure as Governor of this state. For I now must conclude that the conduct of this investigation and prosecution has been such that we now confront the real possibility that the law itself may well fall into disrespect. Hence, I have concluded that, as Governor, I have the final responsibility to bring this tragic affair to a conclusion which, however unsatisfactory, will foster respect for our system of justice as one capable of recognizing and correcting its wrongs.

In addition, beyond what I see as my constitutional responsibilities, as an elected leader of our state, I am moved to recognize that Attica has been a tragedy of immeasurable proportions,

unalterably affecting countless lives. Too many families have grieved, too many have suffered deprivations, too many have lived their lives in uncertainty waiting for the long nightmare to end. For over five years and with hundreds of thousands of dollars and countless man-hours we have followed the path of investigation and accusation. We have succeeded in dividing and polarizing the people of the state without satisfying the quest for justice in this tragedy. To continue in this course, I believe, would be merely to prolong the agony with no better hope of a just and abiding conclusion.

'A Time to "Close the Book" '

Attica lurks as a dark shadow over our system of justice. The time has come to firmly and finally close the book on this unhappy chapter of our history as a just and humane state.

I am therefore accepting the recommendations of Superintendent Connelie and Commissioner Ward that no disciplinary action be commenced against the 20 state officers and employees identified by Mr. Scotti. I also accept the recommendation of Mr. Scotti that six inmates convicted of crimes committed at Attica be granted a pardon for these convictions. In addition, I am extending clemency to the two other inmates convicted of Attica-related crimes — one will be pardoned, and the Attica related sentence of the other will be commuted, making him eligible for parole.

These actions should not be construed as a reflection of a lack of culpability for the conduct at issue. Rather, these actions are in recognition that there does exist a larger wrong which transcends the wrongful acts of individuals caught in the seamless web into which the tragedy of Attica has spun itself. They are in recognition of the immutable principle in our society that the state itself should not sanction the maintenance of legal proceedings out of harmony with the principles of equal justice.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

AKIL AJ-JUNDI, a/k/a Herbert Scott Deane, et al.,

Plaintiffs,

vs. Civ. No. 75-132E

THE ESTATE OF NELSON A. ROCKEFELLER, et al.,

Defendants.

ADDITIONAL AFFIDAVIT OF THERESA A. SMYTH IN SUPPORT OF MOTION TO DISMISS CERTAIN CAUSES OF ACTIOIN AND OTHER RELIEF

STATE OF NEW YORK)
COUNTY OF ERIE) ss:

I, THERESA A. SMYTH, make this additional affidavit in support of the Motion to Dismiss Certain Causes of Action as Against Vincent R. Mancusi and Other Relief and further state:

1. I am Legal Assistant to Richard E. Moot, Esq., counsel for Defendant Vincent R. Mancusi in this action.

2. On January 16, 1986, three days after the writing and filing of my first Affidavit, John H. Stenger, Esq., counsel for Defendant Oswald in the present action, was able to retrieve, from warehouse storage, his *Inmates I* files which contained the reports of United States Magistrate Edmund F. Maxwell on the contempt proceedings initiated for the violation of Judge Curtin's injunction as granted on December 14, 1971 and amended on December 21, 1971. The following day, our office received copies of these same five reports. (See Exhibit A)

3. Vincent R. Mancusi was Warden at the Attica Correctional Facility from September of 1965 until he retired in March of

1972. From a review of the reports of Magistrate Maxwell, the contemptuous act in *Misc. Crim. A* occurred on February 22, 1972, in *Misc. Crim. B* on January 27, 1972, in *Misc. Crim. C* on February 20, 1972, in *Misc. Crim. D* on April 3, 1972, and in *Misc. Crim. E* on February 7, 1972. Thus, Mr. Mancusi was Warden at the time during which four of the alleged acts of contempt occurred.

4. Petitioners and supporting witnesses, involved in these contempt proceedings, are not unfamiliar to this Court. All have played various roles in other actions arising from the 1971 Attica uprising as either named plaintiffs or members of the plaintiffs class. For example, Mariano Gonzales, petitioner in *Misc. Crim. C* and witness in *Misc. Crim. A*, was a named Plaintiff in *Inmates I* and is currently a claimant in the New York State Court of Claims. Harold Walker, a witness in *Misc. Crim C*, was a named plaintiff in the *Walker* case. Roger Champen, a witness in *Misc. Crim. E*, was a named plaintiff in *Innates II*, Lastly, Steven Merkel and Raymond Sumpter, both supporting witnesses in *Misc. Crim. C*, were also both named plaintiffs in the *Nieves* and *Walker* cases.

5. Once again, these same complaining inmates are before this Court in the present action as either named plaintiffs or members of the plaintiff class. Specifically, Jerome Rosenberg and George Nieves testified in *Misc. Crim. A*. Frank Smith, Calvin Hudson, and Raymond Sumpter testified in *Misc. Crim. C*. Herbert Scott Deane testified in *Misc. Crim. E*. All six of these inmates are presently before this Court as named plaintiffs in *Al-Jundi*.

6. In all five of the contempt proceedings initiated, petitioners claimed and inmates supported, through testimony and affidavits, allegations of physical and verbal abuse in violation of Judge Curtin's injunction. After careful consideration of the testimony and affidavits submitted, Magistrate Maxwell found that, in all but *Misc. Crim. A*, there was not sufficient credible evidence to believe that the alleged acts occurred as claimed by petitioners and thus, no probable cause existed to commence formal criminal contempt proceedings.

7. In *Misc. Crim. A*, Magistrate Maxwell found that, "while the evidence did not satisfy him beyond a reasonable doubt as to the happening of the incident, probable cause did exist which would justify the commencement of formal criminal contempt proceedings". Thereafter, a jury trial was scheduled to be held before Judge Curtin. However, complaining inmates refused to testify at such a trial and the charges were subsequently dismissed.

8. In accordance with the testimony given before and conclusions reached by Magistrate Maxwell, there was little evidence that incidents of physical or verbal abuse were occurring either during the time that Mr. Mancusi was Warden at Attica or after he retired. Moreover, petitioners and complaining inmates had a "full and fair" opportunity, in *Misc. Crim. A*, to prove allegations of reprisals and they did not do so. Now, these same inmates once again make the same allegations, in paragraph 58 through 67 of the Second Amended Complaint in *Al-Jundi*, of physical and verbal abuse.

9. Furthermore, under the direction and with the assistance of Richard E. Moot, Esq., I began reviewing all transcripts of proceedings in the *Inmates I* file (Civ. No. 1971-410) at the Clerk's Office. Before my review was completed, the Clerk's Office returned the file to storage. I have since been advised that its retrieval from the New Jersey warehouse will take up to two weeks.

10. From my initial review, it was clear that extensive testimony with regard to physical and verbal abuse was given before Judge Curtin in *Inmates I*. Thus, the same inmates now come before this Court as plaintiffs to testify once again to the same incidents as testified to over ten years ago before both Judge Curtin and Magistrate Maxwell.

11. On Mr. Moot's instructions, I have again requested the return of the *Inmates I* file to the Clerk's Office so that I can

cite specific instances from the transcripts in support of the above.

/s/Theresa A. Smyth
THERESA A. SMYTH

Subscribed and sworn to
before me this 12th day of
February, 1986.

/s/ Victoria M. Kuzenko
NOTARY PUBLIC
VICTORIA M. KUZENKO
Notary Public , State of New York
Qualified in Erie County
My Commission Expires March 30, 1987

CERTIFICATE OF SERVICE AND FILING

I, Richard E. Moot, Esq., Counsel for the defendant Vincent R. Mancusi, certify that the above Additional Affidavit of Theresa A. Smyth in Support of Motion to Dismiss Certain Causes of Action and Other Relief was served upon all counsel of record and thereafter filed with the Clerk of The United States District Court for the Western District of New York.

Dated: Buffalo, New York
February 12, 1986

/s/Richard E. Moot
Richard E. Moot, Esq.

JAECKLE, FLEISCHMANN & MUGEL
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Norstar Building
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716-856-0600

JOHN H. STENGER
PARTNER

January 16, 1986

Richard E. Moot, Esq.
Moot & Sprague
2300 Main Place Tower
Buffalo, New York 14202

Dear Rit:

We have now been able to secure the return from dead storage of the Attica files I spoke to you about.

There were five separate contempt proceedings initiated and I am enclosing copies of the reports of the Magistrate with regard to each of these proceedings.

It appears from the dates of the incidents that most if not all did occur when Mr. Mancusi was Superintendent and this material may be of assistance to you.

You will notice that further proceedings were ordered only with respect to Proceeding A pertaining to Officers Miller and Wade. A jury trial was scheduled in their case before Judge Curtin but the charges were dismissed when the complaining inmates indicated that they would refuse to testify at such a trial.

Please let me know if I can be of any further assistance with regard to these matters.

Very truly yours,
/s/John H. Stenger
JOHN H. STENGER

JHS:sm
Enc.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

In the Matter

of

The Application of MILTON JONES, for commencement of Criminal Contempt Proceedings against CORRECTION OFFICER CHARLES MILLER and ONE UNKNOWN EMPLOYEE of the ATTICA CORRECTIONAL FACILITY, believed to be CORRECTION OFFICER JAMES WADE

Miscellaneous Criminal A

APPEARANCES: JOHN T. ELFVIN, ESQ.,
United States Attorney,
By RICHARD J. ARCARA, ESQ.,
Assistant United States Attorney,
And CARLTON STOIBER, ESQ. and
MICHAEL FERGUSON, ESQ., Attorneys,
Department of Justice,
Appearing on behalf of the Government

LOUIS J. LEFKOWITZ, ESQ.,
Attorney General of the State of New York,
By JOHN H. STENGER, ESQ.,
Special Assistant Attorney General,
700 Liberty Bank Building,
Buffalo, New York
Appearing on behalf of the Respondents

Milton Jones, an inmate of the Attica Correctional Facility, has alleged that on February 22, 1972, while in the west gallery of the third floor of Housing Block Z in the Reception Building at Attica, he was struck by Correction Officers Charles Miller and James Wade, and that such action constituted a violation of the injunction of Honorable John T. Curtin dated December 14, 1971, and as amended December 21, 1971.

Pursuant to the order of Judge Curtin, a hearing was held before the undersigned to determine whether there exists probable cause to commence formal criminal contempt proceedings against these respondents.

Mr. Jones was housed in cell No. 11 of the west gallery. The gallery consists of 19 cells facing on a hallway about six feet wide which runs from the day room area on the south, where cell No. 1 is located, to the entrance to the exercise yard on the north, where cell No. 19 is located.

In his testimony at the hearing, Jones stated that as he left his cell to go to the exercise yard he walked in a northerly direction past Correction Officers Miller and Wade who were to escort him to the yard. He refused to stop for a pat frisk and was pulled from behind by Miller who told him to hold up. Jones told the correction officer that he wasn't holding up and continued down the gallery towards the exercise yard. When he was at the gate to the exercise yard, he refused to be frisked and was told to return to his cell.

As Jones walked back towards his cell, he claims that he was pushed from behind by Miller and was choked by him. He testified that he was then kneed by Correction Officer Wade and thereafter kicked into his cell by one of the correction officers. He says he later refused the request of a correction sergeant to be examined by a doctor.

Inmate Richard Fisher was in cell No. 18 on the west gallery at the time of the alleged incident. He spoke briefly to Jones as Jones went past his cell towards the exercise yard with Correction Officers Miller and Wade. He heard Jones tell someone to take his hands off and heard Miller tell Jones to return to his cell. He saw them walk back towards Jones's cell with Wade in the lead, followed by Jones and then Miller. Fisher claims that at about cell No. 17 he saw Jones pushed from behind by Miller; that Jones stumbled and hit the radiator. Miller then choked Jones, whereupon Wade came back and kneed Jones. He claims that the correction officers then wrestled Jones out of his view towards Jones's cell.

James Murphy, in cell No. 12 on the west gallery, testified that he heard a commotion and someone say "Leave me alone, get your hands off me." He then observed inmate Jones coming into his view from the direction of the exercise yard, being pushed and shoved by Correction Officers Miller and Wade. He claims that Officer Miller pushed Jones into the bars of Murphy's cell and then flung Jones into cell No. 11. He claims that Miller used a racial epithet. Later, Sgt. English came to Jones's cell and asked Jones if he wanted to see a nurse, but Jones refused to leave his cell. Murphy says that he does not recall Jones asking for a nurse or telling any correction officer that he had been hurt.

Samuel Walls was in cell No. 15 of the west gallery and saw Jones being escorted to the exercise yard by Correction Officers Miller and Wade. Later, according to his testimony, he heard voices and observed Jones at the radiator near cell No. 16, being choked by Miller and having his arm twisted by Wade. He did not see anyone "knee" Jones. Walls claims that he went to the vent in the rear of his cell to tell inmates on the east gallery of the events and next saw the officers pushing Jones in a southerly direction towards his cell. He heard a scuffle and heard an officer tell Jones to get in his cell.

Jerome Rosenberg, in cell No. 19, claimed that he was reading in his cell when Jones passed by on his way to the exercise yard. He heard a commotion to the right of his cell in the vicinity of the exercise yard and saw Jones come back, followed by Officers Miller and Wade. He alleges that when Jones was at about cell No. 17, Miller pushed Jones, put his arm around Jones's neck and punched him and that Wade struck Jones with his knee. The guards then shoved Jones down the gallery towards Jones's cell.

Thomas Lewis was in cell No. 16 on the west gallery. He states that on the day of the incident involving Jones, he heard a commotion from the gallery and, using a mirror to see, observed Jones in the gallery to the south in the vicinity of cell No. 13. He saw an officer withdrawing his hand from Jones and then

Jones walked toward the exercise yard followed by a correction officer. The officers cut off Jones at the gate to the exercise yard and Jones then turned around and came back down the gallery towards his cell. Lewis testified that as Jones passed his cell, Lewis asked if he was all right and Jones indicated that he was, so Lewis went back to his letter writing. A few seconds later, Lewis heard a little noise again and when he looked down the gallery, Jones was in his cell. Lewis's cell is opposite the radiator where the other inmates allege the incident occurred and the radiator is in full view of Lewis while standing at his cell door.

Mariano Gonzales, in cell No. 17, testified that he had been sleeping and woke up when he heard bars rattling. He went to the front of his cell and saw Correction Officer Wade on the gallery in the vicinity of cell No. 14, straightening his tie. Gonzales said he never saw Jones at the time. He claims to have seen Miller in the vicinity of cell No. 15 near a radiator. He also alleges that the incident occurred on a Monday, which would make the date February 21st rather than February 22d as claimed by the other inmates. He claims to know the day was Monday because it happened four days after an incident between himself and correction officers on February 17, 1972.

George Nieves was in cell No. 8 and claims that by looking to his right he could see a portion of the gallery in front of cell No. 11. Looking to his left, he could see the wall along the gallery in front of cells No. 2 or No. 3. On the day in question, Nieves had been to the exercise yard immediately before Jones went. He did not hear any conversation between Jones and the correction officers as Jones left his cell but later heard a commotion and screams. He alleges that before Jones was brought back to his cell a correction sergeant was called onto the gallery and that three correction personnel were present when Jones was put back in his cell. Later Jones was taken off the gallery and was gone for about one half hour. Nieves claims that Jones was limping as he left the gallery.

Stephen Garrett, in cell No. 14, stated that Jones went past his cell towards the recreation yard and then Garrett heard Jones

tell the guards to take their hands off him. Garrett looked towards his right, heard Jones talking to inmate Lewis, then saw Jones coming towards Garrett's cell. He claims an officer pushed Jones. One officer put his arm around Jones's neck and the other officer hit him in the chest. Garrett alleges that Jones then told the officers to take their hands off him and an officer responded "Nigger get back to your cell." Garrett says he told Jones to go in his cell but Jones indicated that he wanted to stay out until a sergeant came. Garrett claims that as they were passing his cell the officers were pushing Jones towards his cell and that Jones then asked that he be allowed to walk to his cell. Garrett saw a foot go up and heard the cell door close. Officer Miller then went south towards the day room and Wade came north past Garrett's cell towards the exercise yard, where he was heard talking to inmate Rosenberg. Later a sergeant came to Jones's cell and asked Jones what happened and also asked if Jones wanted to see a nurse, to which Jones responded that he wanted to see someone above a sergeant's rank.

Correction Sergeant Richard Miller (no relation to the respondent Charles Miller) testified that on February 22, 1972 when Jones was taken from his cell, he (Sgt. Miller) was standing near the control room to the south of the west gallery, looking north along the gallery. He claims that he had a clear view and saw Jones come out of his cell and push past Officers Charles Miller and Wade. He could not tell if there was physical contact at that time. Jones did not stop for a frisk, nor did he fold his arms, but continued in a northerly direction towards the exercise yard where there was a discussion with the officers which was not audible to him. He claims to have seen no contact other than Jones brushing past the guards. He states that after Miller and Wade put Jones in his cell, Sgt. Miller asked what the problem was and they replied that Jones would not submit to a frisk or fold his arms.

Sgt. Miller states that he then went to the second floor and while there heard a commotion on the third floor. He believes that he then was informed that Jones claimed to have been beaten. Sgt. Miller at that time made a report of the incident.

He became aware of Jones's claim about fifteen to twenty minutes after Jones was put back in his cell.

Sgt. Jack English testified that when he was on the second floor of HBE Correction Officer Head telephoned him and advised that Jones claimed to have been beaten. English called for a nurse and then went to the third floor and talked to Jones who claimed that Correction Office Miller had beat him up. Jones was taken from his cell to the vestibule area but refused to take a physical examination unless his attorney was present. When Sgt. English went to the south gallery to ask Judge Willis, of the McKay Commission, to be present, Jones returned to his cell and was not examined. Sgt. English said he observed no injuries to Jones.

Judge Charles Willis testified that, while acting as a counsel for the McKay Commission at Attica in the winter of 1972, he was asked by Sgt. English to be present while inmate Jones was examined by a nurse. Judge Willis went to inmate Jones's cell and asked if Jones wanted Judge Willis present during the physical examination but Jones declined the offer.

Correction Officer Harvey Head testified that he was standing in the control room operating the locks for the cells in the west gallery at the time of the incident. He was standing at a window which gave him a view of the west gallery. He states that after Officers Miller and Wade gave a signal, he opened the door to Jones's cell, that Jones came out onto the gallery, stopped for a moment, and then stepped away as Officer Miller started to frisk him. He believes that Officer Miller grabbed Jones by the coat tail but Jones continued to walk north on the gallery towards the gate leading to the hall in front of the exercise yard. As Jones walked towards the gate, Head unlocked the gate. He stated that he could not determine whether the officers were having a conversation with Jones. He did not see either Miller or Wade touch Jones except for the tugging on Jones's coat tails. He claimed that they were within his sight at all times while Jones was out of the cell, but that he did not look when operating the lock box. He claims that when Jones reached the gate near

cell No. 19, he turned around and walked back followed by the two officers. He claims that if either officer had pushed Jones hard enough to cause him to stumble, that he would have observed such an incident.

About ten minutes later, according to Head, Jones told an officer delivering supplies that he had been beaten and then Head notified Sgt. English.

Various pictures of the gallery were introduced in evidence and pursuant to the agreement of counsel, the undersigned and counsel personally inspected the gallery where the incident is alleged to have occurred. Each of the cells on the west gallery is about six feet in width; thus, the distance from the gate at cell No. 1 to the gate at cell No. 19 is about 115 feet.

The cell door slides parallel to the bars at the front of the cell, creating a small opening through which a person inside a cell on the west gallery can see at an angle to his left a distance down the gallery of approximately six or seven cells, towards the lower numbered cells and the vestibule area. When he looks to his right, towards the exercise yard, he must look along the bars and thus only sees down the gallery about three cells. In neither case can he see the entire width of the gallery but his visibility narrows towards the outer wall as the distance increases.

If, as alleged by the inmates, Jones was struck while at the radiator (which is next to the outer wall) between cells No. 15 and No. 16, the incident could have been clearly seen by inmates Garrett (cell No. 14), Walls (cell No. 15), Fisher (cell No. 18), and Rosenberg (cell No. 19), who claim they saw the whole incident, as well as by Gonzales (cell No. 17) who claims he was sleeping, and Lewis (cell No. 16) who did not seem to notice any commotion of the type described by the other inmates although his cell was directly opposite the radiator where most of the inmates claim the incident occurred.

Examination of the premises would also indicate that Correction Officer Head and Sgt. Richard Miller (who indicated

their positions on Government Exhibit No. 1, a diagram of the gallery) were approximately 75 feet from the entrance to Jones's cell and approximately 125 feet from the gate at cell No. 19.

Admittedly, there are discrepancies in the testimony and the affidavits of the inmates as to some aspects of the incident; whether Jones actually had his arms folded (his affidavits indicate they were folded whereas he testified that they were not), the exact location of the alleged assault, the type of blows allegedly inflicted on Jones, and, as regards inmate Lewis's testimony, whether the incident actually happened as alleged.

However, four inmates witnesses, in addition to Jones, all do concur in their allegations that Jones was in fact attacked by the respondents in their presence. While the testimony of one inmate (Lewis) and that of Correction Officers Head and Richard Miller raise a question as to whether the incident did actually occur, sufficient evidence has been presented to me to justify a belief that a genuine issue exists as to whether Jones was assaulted.

While the evidence does not satisfy me beyond a reasonable doubt as to the happening of the incident, the petitioner does not have such a burden on this hearing. I therefore find that, based upon the evidence submitted, probable cause exists which would justify the commencement of formal criminal contempt proceedings against the respondents Charles Miller and James Wade.

(Signed) Edmund F. Maxwell

EDMUND F. MAXWELL
United States Magistrate

Dated: Buffalo, New York
November 1st, 1973

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

IN THE MATTER OF THE APPLICATION OF JIRI G. NEWPORT FOR COMMENCEMENT OF CRIMINAL CONTEMPT PROCEEDINGS AGAINST AN UNKNOWN EMPLOYEE OF ATTICA CORRECTIONAL FACILITY, BELIEVED TO BE CORRECTION OFFICER DAVID MAKOVITCH

Miscellaneous
Criminal B

REPORT

EDMUND F. MAXWELL, United States Magistrate

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

In the Matter

of

The Application of JIRI G. NEWPORT for the commencement of criminal contempt proceedings against an UNKNOWN EMPLOYEE OF ATTICA CORRECTIONAL FACILITY, believed to be CORRECTION OFFICER DAVID MAKOVITCH

Miscellaneous Criminal B

APPEARANCES:

JOHN T. ELFVIN, ESQ.,
United States Attorney,
By RICHARD J. ARCARA, ESQ.,
Assistant United States Attorney,
And CARLTON STOIBER, ESQ., and
JOHN ASHTON, ESQ., Attorneys,
Department of Justice, Appearing on
behalf of the Government

LOUIS J. LEFKOWITZ, ESQ.,
Attorney General of the
State of New York,
By JOHN H. STENGER, ESQ.,
Special Assistant Attorney General,
700 Liberty Bank Building,
Buffalo, New York
Appearing on behalf of
the Respondents

Jiri Newport, an inmate of the Attica Correctional Facility, has alleged that on January 27, 1972, while in an elevator in the hospital building at Attica, he was beaten by a correction officer who he later identified as David Makovitch, all in violation of the injunction of the Federal Court, Western District of New York, dated December 14, 1971 and as amended December 22, 1971, prohibiting physical abuse of the inmates.

Hearings have been held pursuant to the order of Honorable John T. Curtin, referring the matter to the undersigned to determine whether there exists probable cause for the court to commence formal criminal contempt proceedings against the respondent, Makovitch.

Mr. Newport testified that on January 27, 1972, he was housed in A Block, One Company, Cell 35. On the afternoon of that date, he, along with six or seven other inmates, was taken from A Block to the hospital building to be interviewed by personnel of the McKay Commission who were at that time conducting interviews with inmates in rooms set aside for their use on the third floor of the hospital building at the facility. The inmates were escorted by one correction officer, identified at the hearing as the respondent, Makovitch.

Mr. Newport says that he was interviewed by a McKay Commission representative for about ten minutes and on its completion he stopped in another room where an inmate named Elie was being interviewed. He told Elie that he wanted to talk to him in the yard the next day because something that was brought up at Newport's interview involving Elie bothered him and he wanted to have the matter straightened out.

Newport then went to a bench, waiting to be taken back to his cell.

Newport testified that Makovitch, in an attempt to be friendly, made reference to the McKay Commission employees as troublemakers and pigs, whereupon Newport responded in a

manner derogatory towards correction officers. He claims that the officer then became flushed and left the area.

About fifteen minutes later, the same officer came back and told another officer that he was going to take Newport back to his cell alone. Makovitch and Newport entered an elevator operated by Inmate Victor Langford to descend to the first floor. There were no other occupants of the elevator. Newport testified that the operator stood in the left front facing forward; that he (Newport) was standing to the right of the operator with arms folded, facing the front, and Makovitch was behind him. He claimed that Makovitch asked him if he liked what had been said about the McKay Commission employees, and when Newport turned his head to respond, he was struck on the right side of the face by a night stick swung by the officer. Newport says that he dropped his arms, turned towards the officer, called him an obscene name, and stepped towards him. The officer allegedly then punched Newport in the face with his right fist while still holding the stick in his right hand. Newport laughed and again faced the front of the elevator. He alleges that the inmate operator observed the entire incident.

Newport claims that on the way back to his cell Makovitch said that he had had a difficult day, that his nerves were on edge, and suggested that they both forget the incident. Newport testified that he said "O.K." and that he returned to his cell without further conversation.

Newport made no complaint to anyone encountered on the five to ten minute walk back to his cell, including a sergeant and three correction officers at the first floor entrance to the elevator, officers at the various gates and check points enroute to A Block, and the correction officer who took custody from Makovitch at A Block and returned him to his cell.

Newport testified that he first complained of the incident to the authorities the next day, January 28th, when a correction sergeant compelled him to secure medical treatment. He stated that he would not have gone on sick call if the sergeant had not

told him that it was necessary, because it was his intention to wait until after he was to see the McKay Commission again on January 28th before he complained.

At one point in his testimony he stated that he did not make complaint to any other inmates at the time he returned to his cell, first mentioning the incident later that night when he talked to a friend in a nearby cell. At another point in his testimony he alleged that he first made complaint to a fellow inmate named Johnson upon his return to A Block immediately after the incident.

The medical records of the institution relating to Mr. Newport bear the following entry under date of January 28, 1972:

> "Claims to have been hit (with) a stick by Officer yesterday afternoon after 3 pm on hospital elevator. Has swelling of right cheek. - Xrayed."
>
> /s/ "J. D. Huff R.N."

There is no indication in the record as to the time of day this entry was made.

Mr. Huff, the civilian nurse, testified that the entry is in his handwriting but he neither recalled examining Newport nor making the entry. He admits that the entry in his handwriting would indicate that he did in fact examine Mr. Newport, but could not state at what time the examination was conducted.

The records also show that various X-rays were in fact taken of Mr. Newport and indicated no fractures.

Mr. Huff testified that the regular daily sick call is held at 8:00 a.m. at which a physician examines the various inmates. He further stated that the nurse examines if the inmate comes in after sick call is completed.

There seems to be no question but that Mr. Newport did in fact have some injury to his face. However, the issue in dispute is whether it resulted from the claimed assault by respondent on the afternoon of January 27, 1972, in the hospital elevator as alleged by Mr. Newport, or whether it happened at some other time under different circumstances.

Various fellow inmates housed in A Block were called as witnesses in support of Mr. Newport's allegations, but their testimony in many instances was not only self-contradictory but was also contradictory to other inmates' testimony.

Donald Ward, who was housed in Cell 30 of A Block, One Company (five or six cells from Newport) during this period, testified that one day in the latter part of January 1972, about 10:30 a.m. (he does not remember the exact date or day of the week), Newport left the gallery. About 45 minutes later he observed Newport return to his cell, at which time Newport had a lump over his right eye. He claims that at this time Newport told him that he (Newport) had been hit by a correction officer in an elevator after returning from the McKay Commission. He further alleges that at that time there was a commotion on the gallery and all of the other inmates were inquiring as to what had happened.

Mr. Ward had, on March 5, 1972, prepared a signed statement which was filed in this court in support of Newport's contempt application, alleging that the incident happened on "Friday morning, January 28th, 1972." He testified in this hearing that he prepared the statement on March 5th at the request of Newport, but not remembering the date of the alleged incident, asked Newport when it occurred and was told by Newport that it had happened on January 28th. Thus Ward's testimony and statement are in conflict with Newport as to the date of the incident, the time of day, and whether Newport made complaint immediately upon returning to his cell or later that night. It should be noted that Newport testified that he went to a McKay Commission interview on January 28th as well as on January 27th.

Inmate James Glenn testified that about 10:30 or 11:00 a.m. on a morning in the latter part of January 1972 (he does not recall the date), he saw Newport leave his cell, at which time there was nothing unusual about his appearance. An hour later, Newport came back to his cell, at which time his face was swollen. While Glenn's affidavit filed in support of the contempt application alleges that as Newport passed his cell he asked what happened, Glenn testified that Newport told of the incident at a later time while they were in the recreation yard.

This witness's testimony supports Ward as to the injury having been incurred in the morning rather than in the afternoon as alleged by Newport.

Inmate Robert Johnson filed an undated statement in support of Newport's application in which he alleged that the incident occurred "on or about the 27th day of February 1972." In the statement, Johnson alleged that Newport stopped at his cell and borrowed Johnson's comb and sweater prior to a visit to the McKay Commission. At that time, Newport had no apparent injury. Later that day, the witness observed facial discoloration and puffiness and was advised by Newport that he had been assaulted by a correction officer.

Johnson testified that he first saw Newport between 9:00 and 11:00 a.m. when Newport borrowed the sweater and that Newport returned between 1:00 and 3:00 p.m. when the sweater was returned and Johnson observed the facial injury.

Johnson alleged that the statement's reference to February as being the month of the incident was a mere error in transcription but that the incident did actually occur on the 27th of January. An inspection of the original statement shows that the date and month, both of which are underlined on the statement, are inserted in ink colored differently from the balance of the statement, leading to a conclusion that the date was inserted at a time subsequent to the preparation of the body of the statement and that at the time of its preparation the writer was not certain as to the actual date of the alleged incident. This

conclusion is further buttressed by the use of the words "on or about" in the statement.

Further indication that the injury did not occur on the date alleged by Newport is the fact that Johnson specifically ties in his observation of the injuries with the occasion when Newport borrowed his sweater. However, Newport in his testimony indicated that he borrowed Johnson's sweater on January 28, 1972, the day of his second visit to the McKay Commission, not on January 27th, the day of his first visit to the Commission when he alleges Officer Makovitch struck him.

In testimony which was confusing and self-contradictory, witness Steven Jones claimed that on January 27, 1972, he observed Newport with his hand over his face, evidently because of some injury. He claims to know that the incident happened on January 27th because of what he was told by Newport. He alleges that on January 28th he started to make out a statement at the request of Newport when the officers allegedly refused to take Newport for sick call that morning. He did not complete the statement at that time because two officers took Newport for treatment later on January 28th. Subsequently, Mr. Jones testified that on the same day that he saw Newport's injury he saw two correction officers take Newport to sick call. In addition, the statement which Jones says he prepared on January 28, 1972, states that he saw the injury on January 28, 1972.

Inmate Tyrone Larkins, in an affidavit, alleged that the incident occurred on or about January 27, 1972, and in his testimony claims that it in fact did occur on January 27th. But he claims that he observed Newport's injuries about 2:00 or 2:30 p.m. Larkin testified that on the morning of January 28th, while he and about 20 other inmates were about to go to the yard recreation area, he saw Newport in the hallway outside the cell gallery talking to a sergeant. He did not see Newport in the yard that morning but did see inmate George Elie in the yard. When Larkin returned from the yard, he saw Newport returning to his own cell. Newport himself had testified that he did in fact

go to the yard on January 28th and did talk to Elie, the inmate with whom he had the discussion about the McKay Commission interview.

Victor Langford, an inmate of Attica, was called as a witness on behalf of the respondent. He testified that he operated the hospital elevator during the month of January 1972, taking inmates to the third floor for interview by the McKay Commission. Generally while the elevator is running, he stands on the right side in such a position as to see its entire area, which is about 5 feet wide by 7 feet deep. He testified that normally an inmate passenger would stand toward the rear and the escorting correction officer would stand closer to the door.

Mr. Langford stated that he never witnessed a correction officer strike any inmate on the elevator. He did not know the respondent Makovitch and had no recollection of having seen him prior to the day of his court appearance. He does not know Mr. Newport. He does not know if Officer Makovitch or Mr. Newport had ever been in his elevator, but stated that in order to go to the third floor of the hospital they would have to use his elevator.

He stated that he first learned of Newport's allegation when he was questioned by a correction sergeant as to whether inmate Newport had been beaten in the elevator the day before. He responded to the sergeant that he had no knowledge of any such incident. He further claimed that if an incident such as Newport described had in fact happened on the elevator he would have remembered it and characterized Newport's allegations as to its happening in the elevator as being a lie. He further claims that he did not discuss the matter with Newport at any later time, as claimed by Newport.

The respondent, David Makovitch, testifying in his own defense, stated that he had been employed as a correction officer for approximately two months prior to January 27, 1972, and had been first employed at Attica on December 6, 1971.

On January 27, 1972, he and another correction officer were detailed to escort inmates from their respective companies to the third floor of the hospital where interviews were being conducted by the McKay Commission. He had not performed this type of duty prior to January 27th. On that day, he had taken various groups of inmates to the interview rooms and when a sufficient number had completed their interviews, he would escort them back to their respective companies.

He claims that he did not know Mr. Newport prior to January 27th. He recalls that on the afternoon of January 27th, about 3:30 p.m., he returned an inmate, whose name he did not then know, to A Block and he then proceeded to the locker room inasmuch as his tour of duty had ended. He testified that this inmate was the last inmate to complete interviews on that afternoon, thus there were no other inmates to be taken back. He claims that he was not required to work on the following Friday, Saturday, or Sunday, January 28th, 29th, or 30th. On his return to work the following Monday, he first learned that inmate Newport had claimed to have been beaten by him on the elevator.

He has no recollection of carrying on a conversation with Newport and he categorically denies that he struck or punched Mr. Newport. He does not recall having ever seen Newport before or after that date. He also claims that he has never had any trouble with any of the inmates.

Respondent Makovitch testified that when escorting inmates in an elevator it was his normal procedure to stand toward the front of the elevator where the door is located, with the inmate to the rear. He did not recall where he and Newport stood in the elevator on the day in question, but claimed that he never stands behind the inmate while in an elevator.

Other than the testimony of Newport, the Government has presented no evidence in this hearing that the injury to Newport happened as he claimed it did.

The knowledge of all of the inmates who testified as to the cause of Newport's injuries is based upon what they claim Newport told them. The only possible eye witness to what is alleged to have happened is Langford, a fellow inmate of Newport, and he absolutely denies that any untoward incident took place in the elevator. It seems unusual, to say the least, if the incident happened as he alleged, that Newport, who made a claim of injury the next day, would not have made such a claim immediately upon its happening while still in the hospital building, to the sergeant and correction officers who he claims were at the first floor entrance to the elevator or to the hospital personnel.

The hospital record entry of January 28, 1972, setting out Newport's claim as to the cause of the injury is the only tangible indication, made within a reasonable time after the occurrence, that the injury occurred as Newport alleged, and according to Newport's testimony this hospital visit was occasioned not at Newport's request but at the insistence of a correction officer in A Block. According to Newport, he wanted to talk to the McKay Commission before he complained, but his testimony indicates that while he did in fact talk to the McKay Commission on January 28th, he made no formal complaint until February 23, 1972, some three weeks after the alleged incident and six days after he and the other inmates who testified on his behalf had been transferred to adjoining cells in Housing Block Z.

Mr. Newport explained his delay in making formal complaint by claiming that his lawyer, Barbara Handschu, was out of town and not available for sometime after January 28th. However, Attica Facility records of visits by attorneys show that Mrs. Handschu visited the facility and conferred with inmates on February 2d, 3d, 4th, and 5th. These records also show that she conferred with Newport himself on February 5th, and thus he had opportunity to make complaint at that time.

It should also be noted that while some of those inmates who testified in support of Newport claimed that they prepared affidavits as to the alleged beatings on their own initiative because

they felt that the alleged brutality should be brought to light and because they wanted to prevent future incidents, none of the statements filed in support of Mr. Newport's contempt application were prepared before the end of February 1972, nearly a month later.

Considering only the testimony of Newport's supporting witnesses as to the date when the injury occurred, I am not satisfied that it did in fact occur on January 27th. As set out before, inmate Ward's statement dated March 5, 1972, specifically states that Ward saw the injury on Friday, January 28th, and he, in his testimony, says that he saw the injury on the day it happened. He also testified that Newport told him the injury was suffered on Friday, January 28th.

Newport testified it was his belief that he borrowed Johnson's sweater on Friday, January 28th. Johnson testified that Newport was injured on the day the sweater was borrowed.

If the injury did occur on January 28th, then the respondent is not responsible because he did not work on that day.

Considering the evidence in its entirety, considering the demeanor of all of the witnesses, and particularly considering the testimony of inmate Langford, the only possible eye witness and the only person present who could be classified as a disinterested witness, I do not find sufficient credible evidence to believe that Jiri Newport was injured in the manner claimed by him and thus do not believe that probable cause exists to commence formal criminal proceedings against the respondent David Makovitch.

(Signed) Edmund F. Maxwell

EDMUND F. MAXWELL
United States Magistrate

Dated: Buffalo, New York
November 1st, 1973

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

IN THE MATTER OF THE APPLICATION OF MARIANO GONZALEZ FOR COMMENCEMENT OF CRIMINAL CONTEMPT PROCEEDINGS AGAINST CORRECTION OFFICER "GEORGE," BELIEVED TO BE CORRECTION OFFICER GEORGE PAWLAK, ET AL.

Miscellaneous
Criminal C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

In The Matter of

Miscellaneous Criminal C

The Application of MARIANO GONZALEZ for commencement of criminal contempt proceedings against CORRECTION OFFICER "GEORGE", believed to be CORRECTION OFFICER GEORGE PAWLAK, CORRECTION OFFICER BURNS, believed to be CORRECTION OFFICER RICHARD K. BURNS, LT. STEINBAUGH, believed to be LT. NELSON F. STEINBAUGH, CORRECTION OFFICER GRAHAM, believed to be CORRECTION OFFICER DAVID GRAHAM, CORRECTION OFFICER BIGGENS, believed to be CORRECTION OFFICER CHARLES BIGGENS, LT. BROOKS, believed to be LT. JONATHAN BROOKS, CORRECTION OFFICER CUER believed to be CORRECTION OFFICER WAYNE CUER, CORRECTION OFFICER KLAUSNER believed to be CORRECTION OFFICER KEITH KOSSNER, CORRECTION OFFICER RALPH BOTTONE, CORRECTION OFFICER DONALD DOBBS, CORRECTION OFFICER JOHN STACHOWSKI, CORRECTION OFFICER GERALD MORRESSEY, CORRECTION OFFICERS "THE SMITH BROTHERS" herein designated as "JOHN DOE" SMITH AND "RICHARD ROE" SMITH who may be CORRECTION OFFICER ARTHUR J. SMITH, CORRECTION OFFICER DALE F. SMITH, CORRECTION OFFICER DAVID E. SMITH, CORRECTION OFFICER DONALD A. SMITH, CORRECTION OFFICER EUGENE W. SMITH, CORRECTION OFFICER GERALD J. SMITH, JR., CORRECTION OFFICER MICHAEL S. SMITH, CORRECTION OFFICER RICHARD J. SMITH, CORRECTION OFFICER RONALD M. SMITH, CORRECTION OFFICER WILLIAM E. SMITH, CORRECTION OFFICER WILLIAM R. SMITH, JR., or CORRECTION OFFICER WILLY V. SMITH

APPEARANCES: JOHN T. ELFVIN, ESQ.,
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By JOHN H. STENGER, ESQ.,
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Buffalo, New York
Appearing on behalf of the Respondents

Mariano Gonzalez filed with this court, an affidavit, dated February 20, 1972, alleging that on February 17, 1972, while incarcerated in the Attica Correctional Facility, he was assaulted by various correction officers of that facility. Affidavits of other inmates of the facility were also filed in furtherance of the allegations of Mr. Gonzalez.

At the direction of the Honorable John T. Curtin, a hearing was held before the undersigned to determine whether probable cause existed to commence formal criminal contempt proceedings against the named respondents for knowingly and wilfully violating the orders of Judge Curtin dated December 14, 1971 and December 22, 1971 which prohibited and enjoined them

> "... from subjecting inmates at the Attica Correctional Facility to physical abuse, torture, beatings, or other forms of brutality, including verbal abuse and racial slurs, from threatening such conduct or from authorizing, sanctioning, or permitting such conduct."

Prior to the hearing, the proceedings were dismissed against respondents Gerald J. Smith, Jr., William R. Smith, Jr., Arthur J. Smith, Michael Smith, and Willy V. Smith by order of Judge Curtin. At the start of the hearing, the name of Correction Officer John Stachowski was dropped as a party because of failure to bring him within the jurisdiction of these proceedings.

Upon the completion of the petitioner's case, it was stipulated by counsel for petitioner and respondents that no evidence of any participation in the alleged incident had been presented against respondents Dale Smith, William Smith, or Richard Smith, and, thus, on motion of the United States Attorney, the proceedings were dismissed as against these three persons.

Thus, on the completion of the hearing, the following named were still respondents in the proceeding: Sgt. Ralph Battone, Lts. Willard Brooks and Nelson F. Steinbaugh, and Correction Officers Charles Biggens, Richard Burns, Wayne Cuer, Donald Dobbs, David Graham, Keith Klossner (named in the original title as Kossner), James Morressey (named herein as Gerald Morressey), George Pawlak, David Smith, Donald Smith, Eugene Smith, and Ronald Smith.

* * *

On direct examination at the hearing, Mr. Gonzalez claimed as follows: On February 17, 1972, at about 12:30 p.m., after returning from a visit with his attorney, Barbara Handschu, his legal file was searched by respondent Richard Burns, a correction officer who was working that day on the third floor of the Reception Building commonly known as "HBZ". Burns took a folder from his legal file and, after being advised by Gonzalez that the folder had been in his possession for more than two days, said the material would have to be checked by a sergeant. Sgt. Battone, another respondent, after taking the papers, told Gonzalez that the papers would not be returned until a determination was made as to whether they were "contraband," and asked Gonzalez to return to his cell pending such determination. According to Gonzalez, the sergeant told him that if he found the papers to be proper they

would be returned. Gonzalez told the sergeant that he would not go back to his cell until he spoke to someone in authority. After being again told by Sgt. Battone to return to his cell, Gonzalez stated that he folded his arms around his legal folder and moved backwards, away from the sergeant. Sgt. Battone then pushed him in the face and thereafter other correction officers grabbed him, hit him, pushed him to the floor and kicked him while another officer took his folder. After being told to get up, Gonzalez freed a leg and started kicking, causing all but one guard to release him. The officers again threw him to the ground. The respondent Lt. Steinbaugh came to the area and asked Gonzalez, "If I give you those papers back, will you go back to your cell?" Gonzalez gave a nonresponsive answer, whereupon he was told to get up, to have his picture taken. When Gonzalez said that he would not allow this, he was again restrained and photos were taken. With restraining devices on his wrists, he was dragged to a cell on the second floor of the building. Gonzalez stated that when told by Lt. Steinbaugh to move into the cell, he (Gonzalez) spit at Steinbaugh, whereupon he claims that Steinbaugh kicked him in the hip. He was thrown into a cell, again being kicked by some of the officers.

Gonzalez claims that as a result of the incident he suffered injuries to his wrists, face, neck, and back, but that he refused to be examined by the Attica nurse who came to his cell that day. He stated that he did not ask for medical assistance for the injuries when the medical doctor made the daily visit to HBZ on the morning of February 18th or at any time thereafter (although his sick call record shows receipt of medication for a sore throat on February 21st).

In addition to the above-named respondents, Battone, Burns, and Steinbaugh, Gonzalez also identified respondents Cuer, Morressey, and Graham as having actively participated in the incident.

Although he did not pick out respondent Biggens during the hearing as being a participant, he testified that while being held on the floor of the third floor day room by a number of officers, someone called out the name "Biggens", at which time his leg was released by an officer. He thus assumed that Biggens was the participant who released his leg.

The respondents Brooks, Dobbs, Klossner, Pawlak, David Smith, Donald Smith, Eugene Smith, and Ronald Smith were identified by one or more of the other inmate witnesses as having had some participation in the incident.

Correction Officer Ronald Hollander and respondents Richard Burns and Donald Smith who were in the building at the time testified as to their versions of the incident.

Two of the respondents, Eugene Smith and Donald Smith, testified that they were not in the Reception Building at any time on February 17, 1972 and had nothing to do with the incident. Eugene Smith testified that he was assigned to a truck gate at the rear of the prison, and Donald Smith claimed he was in "C" Block the entire day. The duty roster for February 17th indicated that their assignments were as claimed by them.

Other testimony was presented by the respondents relating to the attestation of the inmates' affidavits presented to the court shortly after the happening of the incident.

* * * *

It is undisputed that on February 17, 1972, there was a physical confrontation involving Mr. Gonzalez and some correction officers. The question at issue is whether such confrontation was instigated by some or all of the respondents without justification, in violation of the Court's injunction or whether, as claimed by the respondents, the incident was caused by the actions of petitioner in attacking Sgt. Battone and refusing to return to his cell when ordered to do so, resulting only in the use of that force necessarily required to maintain order.

While Gonzales testified that the initial push after his refusal to return to his cell was the action of Sgt. Battone, his affidavit of February 20, 1972 (three days after the incident), alleged that

respondent Burns was the first to strike him. As a matter of fact, nowhere in his affidavits of February 20, 1972 or March 9, 1972 is Sgt. Battone's name mentioned, although Gonzalez admitted that he knew the names of both Burns and Battone before the incident, that they were not similar in physical description, and that he knew one from the other. His only explanation of the discrepancy was that it was a "misinterpretation."

Gonzalez claimed that after the papers were taken from him he made no attempt to recover them. However, William McCullough, an inmate locked in cell No. 1 on the north gallery of the third floor, who was in a position to view that portion of the vestibule where this initial encounter took place, testified that he saw one of the correction officers (who he could not identify) take Gonzalez's legal papers and start to look at them, whereupon Gonzalez snatched the papers from him. A scuffle broke out, whereupon Gonzalez was taken out of his view into the day room. McCullough stated that while he did not know respondent Battone by name, he knew him before the incident to have been a sergeant. He testified that he saw the sergeant in the vestibule, but to his knowledge the sergeant did not touch Gonzalez in any way.

Respondent Burns testified that on the day in question he assisted in the search of Gonzalez on the inmate's return from his attorney visit. He stated that on examining Gonzalez's legal file for contraband he noticed a Department of Correction list of inmate transfers. He asked Gonzalez where he had gotten the list and when there was no response, turned the papers over to Sgt. Battone. The sergeant asked about the papers and was told by Gonzalez that he had the papers in his possession for some time. Gonzalez would not say where he had secured the papers, so Sgt. Battone told him that he would have to return to his cell while the papers were checked. Burns stated that he went into the control room to open the cell doors and, while he did not hear what happened because the control room door was closed, he saw Gonzalez reach out to snatch the papers from Sgt. Battone. He saw Battone back up and thereafter other correction officers tried to restrain Gonzalez, whose arms were flailing. The inmate was then taken to the day room area and a call was put in for a lieutenant to come to the third floor.

Officer Burns further testified that at the request of Lt. Steinbaugh he took two polaroid photographs of Gonzalez (which, according to evidence in Miscellaneous Criminal Proceeding "A", were to be taken to show the physical condition of an inmate in the event of any incident). These photographs were of such poor quality as to give no indication as to whether Gonzalez had suffered any injury. Gonzalez was then taken to a cell on the second floor. Burns denied any physical contact with Gonzalez. He stated that Officers Stachowski and Morressey subdued Gonzalez after he struck out at Battone and, after reviewing his report of the incident, indicated that Officers Dobbs, Cuer, Graham, and Sgt. Battone also assisted in taking Gonzalez from the vestibule into the day room. He testified that the incident on the third floor lasted five to ten minutes and that Gonzalez was then taken to the second floor. He denied seeing any officer kick or strike Gonzalez.

* * * *

As to the materials taken from his files, Gonzalez claimed in his affidavit of February 20, 1972, and on direct examination that they had been in his possession for at least two days prior to February 17th, that he had been searched that morning when he went to visit his attorney and had been permitted to keep his papers. On cross examination, Gonzalez stated that among the papers taken was a list of inmates transferred from Attica to other institutions and that this list had been delivered to him the morning of the incident by a correction officer named Hollander at the request of another inmate. At first Gonzalez testified that he did not know the name of the other inmate and that he did not know why the list had been delivered to him. Later he stated that inmate Frank Smith sent the list to him. The list, later placed in evidence, consisted of copies of interdepartmental correspondence of the New York State Department of Correctional Services setting out the names and numbers of inmates transferred from Attica to other State institutions shortly after the Attica riot of September 1971.

Inmate Frank Smith claimed that on the morning of February 17th, Officer Hollander delivered a paper to him which bore Smith's cell number but had Gonzalez's name on it. He stated

that he did not look at it but told Hollander to deliver it to Gonzalez.

Officer Hollander testified that he had in the past, at the request of inmates, delivered papers from one inmate to another but in such cases always examined the papers first. He had no recollection of delivering any papers from Smith to Gonzalez on the morning of February 17th, and further stated that if requested to deliver papers which on examination were found to be Departmental records he would not turn them over to the inmate.

The only person to have visited Gonzalez prior to the incident on that day was Barbara Handschu, his attorney. Mrs. Handschu claimed that sometime prior to February 1972 she had seen such a list, that she never secured a copy for her own use, never delivered or caused a copy to be delivered to Gonzalez, and did not know how it had come into Gonzalez's possession.

* * * *

Harold Walker testified that on February 17, 1972, he was in cell No. 5 on the west gallery of the second floor, immediately adjoining cell No. 6 (to which Gonzalez was taken immediately after the incident on the third floor). He claimed that he saw approximately eight to ten officers dragging Gonzalez along the gallery, that in the vicinity of cells No. 2 and No. 3 he saw Lt. Steinbaugh kick Gonzalez in the back, and that Gonzalez was then thrown into cell No. 6. In addition to his reference to Steinbaugh, he pointed out nine of the respondents as having had physical contact with Gonzalez in the gallery and as to each, his description of their participation was that each was "handling Gonzales roughly and dragging him to his cell." Walker stated that he had prepared an affidavit shortly after the incident and that it was sworn to before Barbara Handschu on February 19, 1972. He stated that he never saw the affidavits of Stephen Merkel, Calvin Hudson, or Raymond Sumpter who were in adjoining cells, Nos. 1, 2, and 4, on the same gallery, and that, while they spoke together about the incident, he did not talk to them about making affidavits. Each of their affidavits, however, is word for word, exactly the same as the

affidavit of Walker as it relates to eight named officers dragging Gonzalez, his being kicked by Steinbaugh, being thrown into the cell, and his complaints of injury.

The testimony of Merkel, Hudson, and Sumpter is at variance with that of Walker and with their own affidavits as to who was dragging Gonzalez to his cell. While Walker and the affidavits allege that at least eight officers were in physical contact with him, Merkel, Hudson, and Sumpter each testified that Gonzalez was held by only two officers, one on each arm, and that the other officers were following behind but not in contact with Gonzalez.

While all four witnesses testified that Steinbaugh kicked Gonzalez between cells Nos. 2 and 3, as set out in the affidavits, their description as to how that particular incident occurred is sufficiently at variance from each other as to lead to a conclusion that they were testifying as to the kick, not from what they had seen but from what they read in the affidavit, particularly as it related to Steinbaugh, a man before whom they had all previously appeared on disciplinary hearings.

Although all of the affidavits allege that Gonzalez was forcibly thrown into cell BW 6, it would not have been possible for Merkel in cell No. 1 and Hudson in cell No. 2 to have seen what occurred at cell No. 6, and Sumpter stated that while he saw Gonzalez pushed in the direction of cell No. 6, he did not see him forcibly thrown into the cell. Merkel admitted that he had looked at the affidavits of others before he prepared his own, Hudson testified that he copied his affidavit word for word the way Walker gave it to him, and, while Sumpter claimed he did not copy any other affidavit, he did testify that Harold Walker told him how to prepare an affidavit.

While Walker denied having seen the affidavits of the others, they are all dated February 19, 1972, and appear to bear the signature of Mrs. Handschu as Notary Public. The records of attorneys visits to inmates at Attica show that Walker saw Mrs. Handschu on February 18th but there is no record of either Merkel, Sumpter, or Hudson visiting Mrs. Handschu at any time during

this period, and Mrs. Handschu when testifying declined to answer any questions relative to the notarizing of these affidavits on the grounds that an answer might tend to incriminate her.

Bearing also on the credibility of Walker's testimony, were his statements about prior convictions. Although on direct examination he was only asked as to the felony which resulted in his incarceration at Attica during February 1972, on cross examination, when asked about other felony convictions, he admitted to a narcotics conviction but denied any other convictions until specifically asked about two other prior felony convictions in 1954 and 1958.

Although Gonzalez's affidavits make no reference to being kicked by Lt. Steinbaugh, he did testify that while being taken to a cell on the west gallery of the second floor, Steinbaugh kicked him after he attempted to spit at Steinbaugh.

At first Gonzalez claimed that he did not learn Steinbaugh's name until days after the incident, which might explain why he did not refer to the Steinbaugh kicking in the affidavit. Later, however, he testified that he had previously known Steinbaugh who had conducted disciplinary proceedings involving Gonzalez. He also admitted that on February 18th he gave his lawyer a disciplinary report slip with Steinbaugh's name on it, and in fact Steinbaugh's name is specifically set out in the February 20th affidavit. It merely alleges that Steinbaugh and others arrived on the scene and directed that a photograph be taken. Although he again makes reference to Steinbaugh in his affidavit of March 9, 1972, he makes no allegation that Steinbaugh kicked him or in any way touched him.

Gonzalez did not testify in this hearing until Walker, Merkel, Hudson, and Sumpter had completed their testimony. Merkel, Hudson, and Sumpter had all been housed together with Gonzalez in the Erie County jail during this hearing and they testified that they had discussed the case. At least one also stated that he had seen the affidavits of others while at the jail. Thus, it is reasonable to assume that the testimony relative to a kicking incident was available to Gonzalez prior to his testifying.

Officer Ronald Smith, one of the respondents herein, testified that on the day in question he was assigned to the hospital. In response to a call he escorted a registered nurse to the third floor of HBZ where he observed Gonzalez being held in a standing position by Officers Cuer and Morressey. The nurse, at the request of an officer, attempted to examine Gonzalez, but, according to Smith, Gonzalez tried to fight off the officers and the nurse was unable to conduct the examination. He claimed that Gonzalez was then removed in a walking position to the second floor and that in response to the order of Lt. Steinbaugh he accompanied Steinbaugh to the second floor after Gonzalez had already started down. He claimed that he and Steinbaugh came on the west gallery of the second floor just as Gonzalez was being placed in the cell (which was about 35 feet from the gallery entrance). He testified that Steinbaugh could not have been close enough to Gonzalez to have kicked him before Gonzalez was put in the cell and that he did not kick him.

* * * *

In addition to the above witnesses, a number of inmates who were in cells in the north, west, and south galleries of the third floor testified as to their claimed observations and identification of various respondents. The evidence shows that, with the exception of the previously described acts on the west gallery of the second floor in the immediate vicinity of inmates' cells, everything occurred in the day room and vestibule of the third floor, the stairwell leading to the second floor, and the second floor vestibule.

With the consent of and in the company of counsel, a personal inspection of the HBZ area was made after all testimony had been completed. An inmate in the first cell of the north or west gallery, by looking at an angle through the bars of his cell, would have some view of the vestibule, restricted, however, by the cell bars and the bars of the gates at the entrance to the gallery and the entrance to the vestibule. The view from each higher numbered cell becomes more restricted because of the angle of view and the increasing distance. The occupant of cell No. 1 on the south gallery has a view

of the day room about three feet in width at the gate leading to the day room, the view again being restricted by the angle of observation looking from the cell as well as by the bars. The view becomes further restricted in the higher numbered cells. Taking into consideration all of the evidence presented, including the physical layout, the testimony of the inmates and of the correction officers, and considering the conflicts and discrepancies as to identification of some of the correction officers, I do not find sufficient credible evidence to believe that respondents Eugene Smith or Donald Smith were present in the HBZ area on February 17, 1972, nor do I find sufficient credible evidence to believe that there was any participation in the incident or physical contact with Gonzalez on the part of Lt. Brooks or Correction Officers Biggens, Klossner, Pawlak, David Smith, or Ronald Smith.

Having reviewed all of the evidence, having heard and observed the witnesses and having considered their demeanor, state of mind and motive, I do not credit petitioner's contentions that he was first struck by either Sgt. Battone or Officer Burns or that he was kicked by Lt. Steinbaugh. In view of petitioner's admission that he refused to return to his cell when ordered to do so and that he resisted when force was used to carry out the order, I do not find any evidence that such force was unjustified, nor do I find any credible evidence that force in excess of that reasonably necessary to restrain the petitioner and maintain order was used by any respondent or by any other employee of Attica Correctional Facility.

On the basis of the above, I believe that there is no probable cause to commence formal criminal contempt proceedings against any of the respondents.

/s/Edmund F. Maxwell

EDMUND F. MAXWELL
United States Magistrate

Dated: Buffalo, New York
November 1st 1973

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

IN THE MATTER OF THE APPLICATION OF ANTHONY WILLIAMS FOR COMMENCEMENT OF CRIMINAL CONTEMPT PROCEEDINGS AGAINST SERGEANT MANN, BELIEVED TO BE CORRECTION OFFICER SERGEANT LOUIS F. MANN, ET AL.

Miscellaneous
Criminal D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

In the Matter

of

The Application of ANTHONY WILLIAMS for commencement of criminal contempt proceedings against SERGEANT MANN, believed to be CORRECTION OFFICER SERGEANT LOUIS F. MANN, SERGEANT ENGLISH, believed to be CORRECTION OFFICER SERGEANT JACK ENGLISH, CORRECTION OFFICER "GEORGE," believed to be CORRECTION OFFICER GEORGE PAWLAK, and six unknown employees of Attica Correctional Facility, believed to be CORRECTION OFFICER ALLAN BRYANT, CORRECTION OFFICER ROBERT HAWKINS, CORRECTION OFFICER JAMES COOK, CORRECTION OFFICER RONALD CRANE, CORRECTION OFFICER ROY HENNENBERG and CORRECTION OFFICER DENNIS HORN.

Misc.
Criminal D

APPEARANCES: John T. Elfvin, Esq.,
United States Attorney,
By Richard J. Arcara, Esq.
Assistant United States Attorney,
John P. Ashton, Esq., and Richard M. Fishkin, Esq., Attorneys, Department of Justice, Appearing on behalf of the Government

Louis J. Lefkowitz, Esq.,
Attorney General of the
State of New York,
By John H. Stenger, Esq.,
Special Assistant Attorney General,
700 Liberty Bank Building,
Buffalo, New York,
Appearing on behalf of
the Respondents

Petitioner Anthony Williams has alleged that on April 3, 1972, while incarcerated at Attica Correctional Facility, he was beaten by Correction Officers and that such beating constituted a violation of the injunction of Honorable John T. Curtin, dated December 14, 1971 and as amended December 21, 1971.

Pursuant to the order of Judge Curtin, this matter was referred to the undersigned to conduct a hearing to determine whether there is probable cause for the court to commence formal criminal contempt proceedings against the correction officers named herein.

At the commencement of the hearing, on the motion of the United States Attorney, the name of Dennis Horn was removed from the proceeding inasmuch as no person by that name had been served with the contempt application, and information received by the United States Attorney failed to disclose the existence of any correction officer with that name.

On the hearing, Mr. Williams testified that the incident which gave rise to this proceeding occurred in the day room area of the third floor of the Reception Building at Attica, the so-called segregation or HBZ area. Mr. Williams had been called for an attorney visit and, according to routine procedure, was about to submit to a body search prior to meeting with his lawyer. Mr. Williams, an asthmatic, claims that for a period of years prior to the incident he had written permission of the Attica authorities to carry a small inhaler bottle of prescription medicine with him at all times. He stated that a copy of such authorization had been given to him and that other copies were in the hospital, the office, and with the hall captain. According to his testimony, the copy which he had on his person was lost during the riot of September 1971.

On the day in question, he claims that when submitting to the frisk, inquiry was made by Officer Pawlak as to the bottle and it was then turned over to Sergeant Mann. Mr. Williams claims that Sergeant Mann refused to allow him to take the bottle

on the attorney visit, that an argument then ensued, and Williams cursed Mann.

Williams testified that Sergeant Mann then told him to return to his cell, whereupon Williams walked up to about one foot from Mann, gesturing with his hands, arguing and saying among other things, "What the — do you mean, back to my cell." Williams claims that at this time another officer touched him on the back, and as he turned his head, Sergeant Mann struck a glancing blow on his left hand and face. Williams then testified that he (Williams) "tried to knock his head off" (referring to Sergeant Mann) and grabbed the sergeant. Williams claimed that he was then grabbed by other correction officers, including respondents Hennenberg and Pawlak, and thrown to the ground. At this time, according to Williams, Sergeant English came to the day room and put manacles on his hands. Williams was let up on his feet and as he was being walked back towards his cell, he claims that Sergeant Mann "drawed back on me" so Williams tried to kick him and Williams was "jumped again." Williams was then taken towards his cell. Sergeant English asked whether Williams would go in the cell if the manacles were taken off. Williams testified that he answered "yes", that the "cuffs" were taken off, and immediately "I tried to knock his (Sergeant English) head off"; whereupon he was rushed by the officers and thrown into his cell. As a result of this incident, Williams claims that his arms were bruised from the manacles and that he suffered brush burns on his side and back for which he was treated by the nurse later that day.

Mr. Williams claims that on a prior occasion Correction Officer Rice, the regular officer on the floor, had allowed him to take his medication on an attorney visit.

Jusmeallah Allah, who was housed in Cell #8 of the Last Gallery at the time of the incident, testified that he observed Mr. Williams leave his cell for the attorney visit and heard some of the conversation in the day room area. He heard an officer tell Williams that he could not take his medicine on the attorney's visit and Williams state that he was not going to the visit without

his medicine and that he intended to see his attorney. Allah heard an officer tell Williams to return to his cell and then saw officers bringing Williams down the gallery. He heard Williams say "Take those (wrist bracelets) off my wrists, they're hurting me." As they came down the gallery, they were tusseling and Williams was trying to get away from the officers. Allah testified that a correction officer asked Williams whether he would go in his cell if the manacles were taken off and that Williams responded "yes." The manacles were released and thereupon Williams took a step towards his cell, then turned and threw a punch at a correction officer. The officers tusseled Williams to the floor and shoved him into his cell.

Mr. Allah identified a statement signed by 17 inmates as bearing his signature. This statement, according to Mr. Williams, was prepared by one Harold Walker, a fellow inmate, and is one of the supporting statements filed on behalf of the petitioner at the commencement of this proceeding. The statement alleges that Williams was "brutally attacked" by various correction officers and that they "proceeded to pummel him with blows and ferociously kicked him in his chest, arms, and stomach" when at Williams' cell.

Allah, however, testified that he did not see any officers kick, punch, or pummel Williams and that he watched all that transpired in the cell area.

None of the other 16 signers of the statement, with the exception of Williams, testified on the hearing.

Garry Haynes, another inmate, testified that he was standing at a stairway gate waiting to enter the day room when the incident occurred and saw some portion of the incident in the day room. He observed a heated discussion between Sergeant Mann and Mr. Williams relative to the inhaler and heard Sergeant Mann tell Williams "You're not bringing the inhaler down (to the attorney visit), it's against the rules. I don't want to hear any more." During this confrontation, Williams was about two feet from the sergeant and was "talking with his hands."

Thereupon, according to Haynes, Williams started to say something and Sergeant Mann swung at him. Haynes stated that Williams tried to deflect the blow and swung at the Sergeant. Williams was grabbed by the officers and forcibly thrown to the ground. Haynes claims that he was taken downstairs by the escorting correction officer as Sergeant English was putting chains on Williams' hands, and thus saw nothing further. He says that the incident which he observed took from eight to eleven minutes. He returned to the third floor after three or four minutes and observed Williams in his own cell as he passed. He asked Williams how he was and Williams responded that he was "all right."

Haynes testified that approximately a month before the incident, he was visiting his attorney at the same time Williams was visiting an attorney and that upon his return to the day room he saw Williams being searched by Correction Officer Rice. Haynes claimed that Rice asked about the inhaler, that Williams said he had the inhaler with him on the attorney visit and that Rice had said "O.K.".

On cross-examination, Haynes denied that he had ever told a reporter from a Rochester newspaper that he had never seen inmates beaten.

None of the witnesses called on behalf of the petitioner were able to identify respondents Allan Bryant, Robert Hawkins, or Ronald Crane as having participated in the incident.

On behalf of the respondents, Correction Officer Thomas Beers testified that he was Haynes' escort on the occasion of the Williams incident. According to Beers, when he and Haynes arrived at the stairwell gate a loud discussion was taking place between Williams and Sergeant Mann. An officer from the second floor, upon becoming aware of the commotion, told Beers to bring Haynes downstairs and they thereupon left the third floor after three or four minutes. He claims that during the time he and Haynes were at the third floor gate there was no physical contact between Williams and any correction officer. Officer

Beers testified that the respondents Pawlak, Hennenberg, Bryant, Hawkins, Cook, and Crane were present, but that Sergeant English was not there at that time.

Correction Officer William Rice testified that he normally worked in HBZ but that April 3, 1972 was his day off. He knew Williams and had occasion to search Williams before an attorney visit about three weeks prior to April 3rd. On that occasion, according to Rice, Williams had a medication bottle in his pocket. Rice told Williams that only legal material and cigarettes could be taken to attorney visits and that the medicine would not be allowed. Rice claims he told Williams that if he wanted to take the bottle he would have to secure permission from the doctor. He alleged that Williams went to the attorney visit without the bottle and without further incident. He denies, as claimed by Haynes, that he ever found medication on Williams when returning from attorney visits.

Officer Rice testified that prior to March 1972, institution regulations authorized HBZ inmates to take only legal material on attorney visits, but in March the regulation was changed to allow smoking materials in the interview room. He claimed that if medicine were required to be administered to an inmate while on an interview, it would be taken to the inmate by an officer. Rice specifically recalled that on one occasion he took medicine to inmate Haynes while Haynes was visiting an attorney.

William S. O'Brien, a newspaper reporter for the Rochester Democrat & Chronicle, testified that on August 15, 1972 he interviewed inmate Gary Haynes and asked if Haynes had ever witnessed any beatings of inmates by correction officers. Haynes responded that he had not witnessed any such beatings. O'Brien asked Haynes if he himself had ever been beaten and Haynes again responded in the negative.

Officer Ray Hennenberg, one of the respondents, testified that while working in HBZ on April 3rd, 1972, he started to frisk inmate Williams prior to an attorney visit and observed the medicine bottle. At this time, officers Pawlak, Cook, and

Sergeant Mann were in the area. He told Williams that the bottle could not be taken to the visit and when Williams started to argue, he called Sergeant Mann. He stated that after further argument between Williams and Mann, the sergeant advised Williams that he was either to go to the attorney visit without his medicine or return to his cell with the medicine. Hennenberg claimed that after further argument and after twice being ordered to return to his cell Williams started to walk towards the east gallery where Sergeant Mann was standing and jumped the sergeant. Hennenberg, Pawlak, and Mann tried to restrain Williams and were joined by Officers Cook and Hawkins, whereupon Williams was wrestled to the floor. Sergeant English came to the day room from the kitchen and wrist restraints were put on Williams. Hennenberg testified that Williams was allowed to get to his feet and, offering no resistance, was escorted back towards his cell by Hennenberg and Sergeant English. When they arrived at Williams' cell, the restraints were taken off after Williams said he would go into his cell. As soon as the wrists were released, according to Hennenberg, Williams took a "roundhouse" swing at him and English with no contact being made. They grabbed him and officers Pawlak, Cook, and Sergeant Mann then came down the gallery and assisted in pushing Williams into his cell. Hennenberg states that at no time did he ever see Sergeant Mann punch or swing at Williams. He claims that he did not strike, kick, or knee Williams and he did not see any other officer strike, kick or knee him.

Even if Mr. Williams' testimony as to Sergeant Mann striking the first blow were to be believed, it is questionable whether such action would come within the purview of the Injunction which prohibits "physical abuse, torture, beatings, or other forms of brutality." The petitioner admits that he did not intend to obey the order to return to his cell, that he used vile language towards the sergeant, that he advanced towards the sergeant and was, as both he and Haynes put it, "talking with his hands" as he approached the sergeant. Although the affidavit filed by Williams in support of his contempt application alleges that Sergeant Mann punched him in the face, knocking him to the ground, his testimony on the hearing was that he was

grazed by a glancing blow, that he was not knocked down, and that he then tried to hurt the sergeant. After observing the demeanor of the witness Williams, his attitude on the witness stand, and after considering the testimony of all of the witnesses, I cannot credit his claim that Sergeant Mann threw the first punch.

Williams' contention that he had previously received a written authorization to carry his medicine at all times is not substantiated by the hospital and medical records which fail to reveal any record of such written authorization. If in fact Williams had a written authorization, which was lost in September 1971, he had adequate opportunity before April 1972 to secure another.

I cannot credit Haynes' claim that he observed a beating in view of his subsequent statements to O'Brien that he had never seen an inmate beaten and in view of Officer Beers' testimony that Haynes left the third floor before there was any physical contact.

In view of Williams' admission that he refused to return to his cell, that he attempted to attack the officers on at least two occasions after the initial confrontation, and considering the extent of the injuries claimed by Williams, I find that the force used by the correction officers was no more than that which was absolutely necessary to restrain Williams and that such restraint was justified.

I believe, based on the testimony, that this incident arose only because of an attempt by Williams to precipitate a confrontation with the officers and not because of any attempt to subject Williams to acts prohibited by the injunction.

Although Haynes claimed that two officers referred to Williams as "nigger", the affidavit of Mr. Williams makes no claim of use of racial slurs nor did Mr. Williams in his testimony recall the use of any racial slurs.

Based upon the foregoing, I do not believe that there exists probable cause to commence formal criminal contempt proceedings against the respondents.

(Signed) Edmund F. Maxwell

EDMUND F. MAXWELL
United States Magistrate

Dated: Buffalo, New York
November 1st 1973

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

IN THE MATTER OF THE APPLICATION OF EDWARD KOWALCZYK FOR COMMENCEMENT OF CRIMINAL CONTEMPT PROCEEDINGS AGAINST CORRECTION OFFICER RICE, BELIEVED TO BE CORRECTION OFFICER WILLIAM RICE, AND THREE UNKNOWN EMPLOYEES OF ATTICA CORRECTIONAL FACILITY BELIEVED TO BE CORRECTION OFFICER SERGEANT ROBERT KIRBY, CORRECTION OFFICER MAX PALMER, AND CORRECTION OFFICER ROY W. HENNENBERG.

Miscellaneous
Criminal E

REPORT

EDMUND F. MAXWELL, United States Magistrate

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

In the Matter

of

The Application of EDWARD KOWALCZYK for commencement of criminal contempt proceedings against CORRECTION OFFICER RICE, believed to be CORRECTION OFFICER WILLIAM RICE and three unknown employees of the Attica Correctional Facility believed to be CORRECTION OFFICER SERGEANT ROBERT KIRBY, CORRECTION OFFICER MAX PALMER, and CORRECTION OFFICER ROY W. HENNENBERG.

Miscellaneous
Criminal E

APPEARANCES: JOHN T. ELFVIN, ESQ.,
United States Attorney,
By RICHARD J. ARCARA, ESQ.,
Assistant United States Attorney,
And RICHARD M. FISHKIN, ESQ.,
Attorney, Department of Justice,
Appearing on behalf of the
Government

LOUIS J. LEFKOWITZ, ESQ.,
Attorney General of the State of New York,
By JOHN H. STENGER, ESQ.,
Special Assistant Attorney General,
700 Liberty Bank Building,
Buffalo, New York
Appearing on behalf of the Respondents

Edward Kowalczyk has alleged that on February 7, 1972, while incarcerated in Housing Block "Z", Attica Correctional Facility, he was struck and forcibly removed from his cell by correction officers and that such conduct was in violation of the injunction of Honorable John T. Curtin dated December 14, 1971, and as amended December 21, 1971.

Pursuant to the direction of Judge Curtin, a hearing was held before the undersigned to determine whether there exists probable cause to commence formal criminal contempt proceedings against the above-named respondents for violation of the injunction.

Mr. Kowalczyk testified on the hearing that on the above date he was told by Officer Rice that he was to go to court but that he received no reply when he wanted to know in what court he was to appear. He claims that he then advised Rice that he would not leave until he had an opportunity to contact an attorney. Later, according to Kowalczyk, Rice returned to the cell with five or six other officers and a sergeant. When he refused to leave his cell, he claims they entered his cell and, in spite of his resistance, dragged him out of the cell. He alleges that in the gallery immediately outside of his cell he was struck in the back of his neck and thereafter dragged down the gallery a short distance. He stated that he stopped resisting while going down the gallery, that he went to the day room, and, after shaving, showering, and dressing, he left the institution with the escorting officers without any further difficulty. He was taken to the Erie County Penitentiary at Wende and on February 8, 1972, after visiting with his attorney, Barbara Handschu, prepared an affidavit in support of an application to quash a subpoena directing his appearance before the Attica Grand Jury.

Kowalczyk claims that as a result of the incident, he had a pain in his back and a bruise on his neck, although he admits to having been on sick call prior to February 7th for the back condition. He is not certain if he asked for medical attention on that day and says that he may have asked for medical attention while at Wende.

In an attempt to corroborate Kowalczyk's allegations, two fellow inmates filed affidavits in the latter part of February 1972 and also testified in this hearing. Both inmates testified that Kowalczyk was struck while outside of his cell but one, Herbert Scott Deane, alleged that a sergeant (identified as the respondent, Kirby) struck Kowalczyk in the back of the neck while the other, Roger Champen, claimed to have observed Sergeant Kirby hit Kowalczyk on the top of Kowalczyk's forehead with the flat of his hand and that this was the only blow struck by any of the officers.

Mr. Deane, who reviewed his affidavit the day before he testified, stated that it was not in his handwriting, that it may have been written by Mr. Champen, and that it may have contained some things which Mr. Champen observed but that he did not see.

Mr. Champen, when shown his affidavit on cross examination (the handwriting being the same as that in Mr. Deane's affidavit), denied that he wrote his affidavit, stated that while it bore his signature he had not read it before he signed it, and indicated that he knew nothing about it. This affidavit alleged that a sergeant struck Kowalczyk in the back of his neck, as opposed to Champen's testimony on the hearing that the sergeant struck the forehead.

While Champen claimed that he was in the cell immediately to the right of Kowalczyk and thus could have a very good view of what may have occurred in front of Kowalczyk's cell, the evidence produced on behalf of the respondents reveals that on the day in question Champen was not in the cell next to Kowalczyk but was in fact two cells to the left of Kowalczyk, next to Deane. Because of the construction of the bars and cell gate at the front of each cell, it is much more difficult when looking out to see to the right along this gallery than to the left, and thus, Champen's view of what may have occurred was much more restricted than his testimony indicated.

The cells in HBZ are side by side with solid walls on the rear and both sides; thus, it is impossible for an inmate in one cell

to observe the interior of any other cell. While Kowalczyk, Deane, and Champen testified that the blow was struck by the sergeant while Kowalczyk was outside of his cell, Kowalczyk, in an affidavit dated February 22, 1972 on the institution of this proceeding alleged that ". . . the sergeant entered his cell . . . then struck (him) sharply several times on the back of his neck, and then removed him from his cell . . . .", in which event, the alleged blows by the sergeant could not have been observed by Deane or Champen.

Correction Officer William L. Rice, one of the respondents, testified that on February 7, 1972, he was on duty on the second floor of Housing Block "Z" where Kowalczyk was housed. Rice told Kowalczyk that he was going to be taken to court and Kowalczyk asked the name of the court. Rice stated that after securing the requested information he advised Kowalczyk that he was being taken to Judge Ball's court in Warsaw (where a Grand Jury investigation into the Attica riot was being held). Rice alleged that the inmates in the adjoining cells started to yell and tell Kowalczyk not to let himself be taken from his cell. Kowalczyk thereupon said "force me." Rice states that he then left the cell area again and notified Sergeant Kirby. He and Kirby went back to Kowalczyk's cell and Kirby asked him to come out. When Kowalczyk again refused, the cell door was opened and Sergeant Kirby entered the cell. Rice claims that Kowalczyk started hitting the cell walls with his hands and that he and Sergeant Kirby each grabbed an arm and removed him from the cell. In the meantime, Officers Hennenberg and Palmer came towards the cell to assist. Rice claims that the officers walked Kowalczyk to the day room area where he took a shower, shaved, and changed his clothes without any objection. Rice stated that no claim of injury was made at that time by Kowalczyk.

Rice denies that any of the officers struck or punched Kowalczyk.

After reviewing all of the evidence and having observed all of the witnesses in this proceeding, I do not believe that there is any showing that these respondents did anything which would

be in violation of the injunction of this court. The petitioner, Kowalczyk, admits that he refused the request of the officers to leave his cell and resisted their efforts to remove him. His testimony as to being struck by the sergeant and the attempts of his fellow inmates to corroborate this allegation are not believable in view of the contradictions by the witnesses as to the occurrence and the discrepancies between the testimony and the affidavits filed in support of this proceeding. It does not appear that force in excess of that reasonably necessary to require Mr. Kowalczyk's removal from the cell was used by the correction officers.

I, therefore, believe that there does not exist probable cause to commence formal contempt proceedings against these respondents.

(Signed) Edmund F. Maxwell
EDMUND F. MAXWELL
United States Magistrate

Dated: Buffalo, New York
November 1st, 1973

Motion of Defendant Mancusi for Summary Judgment.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

AKIL AL-JUNDI, a/k/a Herbert Scott Deane, et al.,

Plaintiffs

-vs- Civ. No. 75-132E

THE ESTATE OF NELSON A. ROCKEFELLER, ET AL.,

Defendants.

MOTION OF DEFENDANT VINCENT R. MANCUSI FOR SUMMARY JUDGMENT DISMISSING THE COMPLAINT AGAINST HIM AND IN THE ALTERNATIVE FOR A HEARING *IN LEMINE*

Defendant, Vincent R. Mancusi, pursuant to Rule 56 moves for an Order:

Relief Requested

1. Granting summary judgment dismissing the Reprisal and Bad Faith Prosecution claims against Vincent R. Mancusi in both his individual and official capacity.

2. In the alternative, for a hearing *in lemine* and partial summary judgment on the discrete issue of whether or not defendant Vincent R. Mancusi was acting solely in his official capacity as Superintendent of the Attica Correctional Facility with respect to the only remaining claims against him, Reprisals and Bad Faith Prosecutions.

3. Granting summary judgment, dismissing the amended complaint in its entirety against all remaining defendants, under the due process and equal rights constitutional provisions.

Motion of Defendant Mancusi for Summary Judgment

The Grounds for the Relief Requested

1. The defendant, Vincent R. Mancusi, while acting or failing to act in his official capacity as Superintendent of the Attica Correctional Facility, was not a "person' subject to suit under Title 48, §1983 (*Will v. Michigan Dep't of State Police*, 109 F. Ct. 2304 1989)).

2. There is no genuine issue as to any material fact in the moving affidavits which establish that the defendant Vincent R. Mancusi did not personally participate in or have knowledge of the alleged reprisals and that everything he did or allegedly failed to do was solely in his official capacity as Superintendent of Attica Correctional Facility in connection with the Reprisals" and "Bad Faith Prosecutions" claims made against him.

3. Defendant Mancusi is entitled to qualified immunity from any claims based upon the decisions he made or actions he took in rehousing the prisoners during the crisis immediately following the retaking.

4. The failure to bring this case to trial for fifteen years has made a just determination and due process no longer attainable. The Governor of the State of New York, by proclamation of December 31, 1976, found that failures to collect or preserve evidence have effectively precluded the possibility of now bringing to justice by trial or disciplinary action any armed personnel' engaged in the Attica uprising. The same is true for the unarmed personnel now forced to defend themselves at trial.

Oral argument is requested.

Dated: Buffalo, New York
March 20, 1990

MOOT & SPRAGUE

By /s/Richard E. Moot
Richard E. Moot
Attorneys for Defendant
VINCENT R. MANCUSI
2300 Empire Tower
Buffalo, New York 14202
(716) 845-5200

NOTICE OF MOTION

TO ALL COUNSEL PER ATTACHED LIST:

PLEASE TAKE NOTICE, what the undersigned will bring the above motion on for hearing before this Court at Part III before Hon. John T. Elfvin, United States District Court, Western District of New York, 68 Court Street, Buffalo, New York, at 4:00 p.m. on April 9, 1990, or at such time as the Court may fix on its briefing order for the motion.

Dated: Buffalo, New York
March 20, 1990

MOOT & SPRAGUE

By /s/Richard E. Moot
Richard E. Moot
Attorneys for Defendant
VINCENT R. MANCUSI
2300 Empire Tower
Buffalo, New York 14202
(716) 845-5200

Affidavit of Vincent R. Mancusi In Support of Motion for Summary Judgment.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

AKIL AL-JUNDI, a/k/a Herbert Scott Deane, et al.,

Plaintiffs

-vs- Civ. No. 75-132E

THE ESTATE OF NELSON A. ROCKEFELLER, ET AL.,

Defendants.

AFFIDAVIT OF VINCENT R. MANCUSI IN SUPPORT OF MOTION FOR SUMMARY JUDGEMENT OR IN THE ALTERNATIVE FOR A HEARING *IN LEMINE*

I, Vincent R. Mancusi, after carefully reading the Amended Complaint dated September 8, 1977 and being duly sworn make this affidavit in support of the motion for summary judgment dismissing the only remaining claims of the Amended Complaint against me in my personal capacity for alleged acts of reprisal and bad faith prosecution and for the other relief requested on the motion. I further state under oath:

1. I was Superintendent at the Attica Correctional Facility from September of 1965 through March of 1972. During and following the September 1971 uprising at the Attica Correctional Facility, I was interviewed, gave written statements, testified before various commissions and before various courts. This included being interviewed by television, magazine, newspaper reporters, the Attorney General's Office, the Jones Committee of the New York State Assembly, the McKay Commission, the Pepper Committee in the House of Representatives and the Grand Jury inquiries.

2. In particular, I testified in the *Inmates of Attica v. Rockefeller*, 453 F.2d 12 (2d Cir. 1971) with respect to the alleged reprisals and the denial of counsel and other alleged wrongs with respect to the investigation leading to the subsequent prosecutions. I was named as a defendant in that action. Both Judge Curtin and the Appellate Court which decided that case found I had not committed any wrong with respect to such claims.

3. In repeated other cases, I was named as a defendant and accused of various wrongs including reprisals and segregated confinement of prisoners following the retaking of the Attica Correctional Facility. To the best of my knowledge, no judgment has ever been rendered against me with respect to such wrongs or any act or omission of mine as Superintendent of Attica or as an individual. I have been furnished a copy of the previous affidavit of Theresa Smyth dated the 12th day of January 1986, which I believe fairly describes these prior suits against me.

4. Three official investigations including one by the Congress of the United States, two grand jury inquiries and the five trials described in the Smyth affidavit have failed to establish that I at any time ever acted or failed to act in anyway in connection with the uprising and the events described in the amended complaint, except in my capacity as Superintendent of the Attica Correctional Facility. Nor did the sworn testimony given by any person at any time in these inquiries and trials to my knowledge ever show that I personally or in an individual capacity committed any of the wrongs alleged in the Second Amended Complaint.

5. In particular, at no time did I enter into any agreement with any of the other defendants or any other person to deprive any of the inmates or plaintiffs in this case of their rights to equal protection of the law and due process under the Constitution. Nor did I ever have any such intention with respect to the rehousing of the prisoners, the subsequent prosecutions or any of the events described in the Amended Complaint.

6. My role with respect to the events described in the Complaint was limited solely to my capacity as Superintendent of the Attica Correctional Facility. I neither acted nor failed to act in any other capacity. My only individual actions were reporting to the facility, as my position as Superintendent required and returning home. Whatever I did while at the facility was only in my capacity as Superintendent and not as an individual. During the retaking, I neither carried nor discharged a fire arm or any other weapon, nor did I at any time strike or harm any inmate in any way. Nor at any time was any torture, beating, or harm inflicted upon any prisoner in my presence or with my knowledge.

7. Under the retaking plan, my assignment was to remain at my desk in my office, to answer the telephone and to relay any messages received to the proper party and to comply with whatever request or instructions I received from Commissioner Oswald or Deputy Commissioner Dunbar and to maintain a log of events as they were reported to me.. That is what I did. The A and D yards were not visible from my office and at no time during the retaking did I view or observe D yard or anything that took place there nor A yard where the alleged running of the gauntlet during the rehousing took place. Aside from carrying out this assignment in my office, which in no way harmed any inmate or plaintiff in this action, I had no personal involvement in the retaking or the alleged violent reprisals.

8. Following the retaking, when control and authority for the prison was returned to me, everything I did was solely in my capacity as Superintendent of the facility. The rehousing and subsequent events following the retaking and alleged wrongs described in the amended complaint were the subject of the numerous inquiries and trials I previously described. In none of these inquiries or trials was there evidence that I had acted in any way other than as Superintendent of the facility and in a proper manner without actionable wrong of any kind.

9. With respect to paragraph 60 of the Amended Complaint, I categorically deny and I am confident that the plaintiffs

cannot produce any evidence from the numerous inquiries and prior trials, that I at any time personally participated in, ordered or permitted with my knowledge any of the following acts to occur:

(a) tear gassing of the plaintiffs except as ordered by those in charge of the retaking.

(b) beating any of the plaintiffs with fists, sticks, or any other objects.

(c) tripping any plaintiff or inmate or member of the plaintiff class in any way.

(d) forcing any plaintiff or member of the class to be stripped naked except as necessary for a strip search prior to being placed in segregation and given back their clothes which was the normal procedure under such circumstances.

(e) forcing any of the plaintiffs to run the gauntlet while other inmates beat and struck them.

(f) improperly placing any inmates in segregated cells. The use of segregated cells where employed was a decision I made as Superintendent and necessary for the safety of the facility and other prisoners.

(g) removal or destruction of any personal property of the inmates except as inescapably occurred during the retaking.

(h) subjecting the plaintiffs to verbal or racial abuse at the times described in the Complaint or at any time while I was superintendent of the Attica Correctional Facility.

(i) threatening the plaintiffs with bodily or other harm, specifically, pointing a shotgun or rifle through cell bars or threatening murder at any time to any prisoner.

10. With respect to paragraph 61 of the Amended Complaint I categorically deny and I am confident that the plaintiffs

cannot show from any sworn testimony in any prior proceeding or trial or any future hearing that I personally participated in, ordered, or permitted with my knowledge, the following acts to occur:

(a) chalking X-marks on the back of any prisoner.

(b) ordering prisoners to lie motionless balancing shotgun shells or other objects under the threat of murder.

(c) burning the prisoners with lighted cigarettes.

(d) confining prisoners in punitive segregation except as in my judgment as Superintendent was necessary for the safety of the facility and the other prisoners.

11. With respect to the 9th count of the Amended Complaint entitled "Bad Faith Prosecution", my role was limited to that of a witness. The prosecutions were conducted by the special prosecutor Mr. Fischer and other state officials. My role as I have described was that of a witness not a prosecutor. I have read the Court of Appeals decision in *Inmates of Attica Correctional Facility v. Rockefeller* and it supports my recollection with respect to the bad faith prosecution allegations of the Amended Complaint, which I have also read. Robert E. Fischer, whom the Governor appointed Deputy Attorney General, was in charge of investigating any crimes committed at Attica during and after the period of the uprising. He, the Commissioner of Corrections and the Bureau of Criminal Investigation were in charge of the investigation and obtaining evidence for any subsequent prosecutions. Neither I nor any member of my staff with my knowledge ever engaged in any such investigation or interrogation of prisoners. I specifically prohibited any such interrogation by my staff. The entire investigation and the subsequent prosecutions was the responsibility of the Deputy Attorney General, Robert E. Fischer. I never, individually, or in my capacity as Warden played any role in the alleged bad faith prosecution except as a witness in numerous investigations, hearings and trials.

12. With respect to the Amended Complaint generally, I reiterate that none of the alleged wrongs were committed by me individually or in my individual capacity. Nor has the extensive sworn testimony in repeated investigations and trial shown that any action which I took or failed to take in my capacity as Superintendent in any way departed from the proper action of a Superintendent under the difficult circumstances present at the time. Certainly, nothing which I did or failed to do as Superintendent was barbarous or shocking to the conscience or a violation of basic decency in any way. I challenge the plaintiffs in this case to produce any evidence which would remotely support such charges against my actions as Superintendent of the Attica Correctional Facility during the period and the events described in the Amended Complaint.

13. Following the hearing, the extensive inquiries and repeated trials, I never received any letter of censure or reprimand of any kind. In the trials, where I testified or was named as a defendant no verdict or judgment of any kind was ever returned against me. In my office as Superintendent of the Attica Correctional Facility, I received a service rating each year on my performance in that job. To the best of my recollection, I have never received a rating lower than "superior which was the second highest rating. I believe in the year 1971 which encompasses the riot, I received the highest rating, outstanding" for my performance during that year.

14. Although at the age of 75, I and my wife at age 73 are currently enjoying reasonably good health, the prospect of facing a sixth trial involving the terrible events of the Attica Riot is terrifying and overwhelming for both of us. My wife and I are of limited means. The travel, time, anxiety and our out-of-pocket expenses of another and perhaps the most protracted trial of all, almost twenty years after the events have occurred, would present an insurmountable burden in establishing the truth. It would irreparably jeopardize our health and deplete our modest personal retirement funds. With most of the witnesses and many of the documents no longer available, I believe that a fair trial and

due process in meeting the angry testimony of a handful of ex-prisoners is no longer possible.

/s/Vincent R. Mancusi
VINCENT R. MANCUSI

Subscribed and sworn to before me
this 9th day of February, 1990

/s/Sandra H. Brewer
Notary Public

Affidavit of Theresa A. Smyth Annexed to Affidavit of Mancusi

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

AKIL AL-JUNDI, a/k/a Herbert Scott Deane, et al.,

Plaintiffs

-vs- Civ. No. 75-132E

THE ESTATE OF NELSON A. ROCKEFELLER, ET AL.,

Defendants.

AFFIDAVIT IN SUPPORT OF MOTION TO DISMISS CERTAIN CAUSES OF ACTION AS AGAINST VINCENT R. MANCUSI AND FOR OTHER RELIEF

STATE OF NEW YORK)
COUNTY OF ERIE) ss.

I, Theresa A. Smyth, make this affidavit in support of the Motion to Dismiss Certain Causes of Action as Against Vincent R. Mancusi and for other relief and further state:

1. I am legal assistant to Richard E. Moot, Esq., counsel for defendant Vincent R. Mancusi in this action.

2. Under the direction and supervision of Richard E. Moot, I did library and Lexis computer-assisted research to identify all actions arising out of the 1971 Attica uprising and the names of all plaintiffs having brought such actions. Thereafter, I limited this search to those actions naming Vincent R. Mancusi as a defendant.

3. With regard to the actions naming Mr. Mancusi as a defendant, the search identified, in addition to the instant *Al-Jundi* action, *Inmates of Attica Correctional Facility v. Rockefeller I*, 453 F.2d 12 (2nd Cir. 1971), *Inmates of Attica Correctional Facility v. Rockefeller II*, 477 F.2d 375 (2nd Cir. 1973), *United States ex rel. Walker v. Mancusi*, 467 F.2d 51 (2nd Cir. 1972) and *Nieves v. Oswald*, 498 F.2d 802 (2nd Cir. 1974). Of these actions, both *Al-Jundi* is and *Walker* was a class action. The class in *Walker* was certified as including all inmates of the Attica Correctional Facility. The present class in *Al-Jundi* is certified as including all inmates present in D Yard at the time of the uprising.

4. In *Al-Jundi*, pursuant to this Court's Order of 7/21/81, there are sixteen named plaintiffs and, pursuant to this Court's Order of 10/30/79, five named defendants (See Exhibit A). Eight of these same sixteen plaintiffs have, in other actions, including the above-referenced ones, named Mr. Mancusi as a defendant and sought relief in various courts, including the United States District Court for the Western and Southern Districts and the United States Court of Appeals for the Second Circuit. The relief requested included judgment against Mr. Mancusi by reason of alleged wrongdoing and reprisals with respect to the Attica uprising.

5. For example, Herbert X. Blyden was a named plaintiff in *Inmates I* (See Exhibit B). Frank Smith and Edward Dingle were named plaintiffs in *Inmates II* (See Exhibit C). Joseph Little was a named plaintiff in *Nieves* (See Exhibit D). Peter Butler was a named plaintiff in *Inmates I* and *Inmates II* (See Exhibits B and C). Both George Nieves and Raymond Sumpter were named plaintiffs in *Nieves* and *Walker* (See Exhibits D and E). Lastly, Calvin Hudson was a named plaintiff in *Walker* (See Exhibit E). Mr. Mancusi was a named defendant in each of these actions.

6. Quotations from these cases, with respect to Mr. Mancusi, are set forth for the convenience of the Court as follows:

> He (Judge Curtin) found that although racial slurs, nighttime harassment, threats and other improper

conduct had continued, there was almost no evidence of physical abuse or brutality after September 14th, and that the Superintendent Mancusi and others in charge had not countenanced the physical abuses or threats on the part of their subordinates.

Inmates of Attica Correctional Facility v. Rockefeller I 453 F.2d 12, 19 (2nd Cir. 1971).

Superintendent Mancusi, on the other hand, countered that neither he nor any members of his staff had engaged in the interrogation of imates and that he had ordered his staff not to engage in such interrogation. As far as he knew, the only interrogation of inmates conducted at Attica was that carried on by Deputy Attorney General Fischer and his staff and by the inmates' own counsel.

Id. at 18.

The Superintendent (Mancusi) reviewed each case, informed each inmate of the evidence against him and gave him the opportunity to consent to continued restricted confinement or to reply to the evidence against him. Substantial evidence of good cause for continued segregated confinement was found as to all except four prisoners who were released to the general population.

United States ex rel. Walker v. Mancusi, 467 F.2d 51, 53 (2nd Cir. 1972).

7. In short, Herbert X. Blyden, Frank Smith, Edward Dingle, Joseph Little, Peter Butler, George Nieves, Raymond Sumpter, and Calvin Hudson have made allegations of wrongdoing and reprisals, arising from the 1971 Attica uprising, against Mr. Mancusi and they have been litigated. Now, these same plaintiffs come once again to litigate allegations of wrongdoing and reprisals, arising from the 1971 Attica uprising, against Mr. Mancusi.

8. Moreover, in my initial search, I identified sixteen actions in the New York State Court of Claims (See exhibit r). I have been able to examine five of these complaints and each alleges general wrongdoing on the part of the State of New York and Mr. Mancusi under which the plaintiff has an opportunity to prove wrongful reprisals.

9. Two of these Court of Claims claimants have, in other actions, sought relief against Mr. Mancusi as named plaintiffs. Specifically, Gilberto Gonzales was a named plaintiff in *Inmates I* (See Exhibit B) and Jomo Joko Omowale is now a named plaintiff in *Al-Jundi* (See exhibit A). However, all of these claimants in the New York State Court of Claims have sought relief before against Mr. Mancusi as part of the class in the *Walker* class action and are now seeking relief again against Mr. Mancusi as part of the class in the *Al-Jundi* action presently before this Court.

/s/Theresa A. Smyth
Theresa A. Smyth

Subscribed and sworn to before me,
this day of January, 1986

/s/Victoria M. Kuzenko
Notary Public

VICTORIA M. KUZENKO
Notary Public, State of New York
Qualified in Erie County
My Commission Expires March 30, 19

Rule 13 Statement of Material Facts not at Issue.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

AKIL AL-JUNDI, a/k/a Herbert Scott Deane, et al.,

Plaintiffs

-vs- Civ. No. 75-132E

THE ESTATE OF NELSON A. ROCKEFELLER, ET AL.,

Defendants.

RULE 13 STATEMENT OF MATERIAL FACTS NOT AT ISSUE

1. Defendant Vincent Mancusi was Superintendent at the Attica Correctional Facility from September of 1965 through March of 1972. (Mancusi Affidavit p. 1). During Mancusi's tenure as Superintendent, 1,200 inmates at Attica rioted, attacking and seizing as hostages forty-nine correction officers. The Attica Prison riot began on September 9, 1971 and lasted until September 13, 1971, at which time Attica was retaken by officers of the New York State Police Department and members of the National Guard. *Al-Jundi v. Estate of Rockefeller*, 885 F.2d 1060 (2d Cir. 1989)).

2. Defendant Russell Oswald, then New York State Commissioner of the Department of Correctional Services, had been given, by then Governor Nelson A. Rockefeller, complete authority over and responsibility for handling the crisis at Attica. Included among Oswald's responsibilities was the authority to conduct and, should they prove unsuccessful, terminate negotiations with the rioting inmates. Oswald was charged also with the responsibility to decide whether a rescue operation was necessary and, if so, when to conduct it. (Estate of Rockefeller, 865 F.2d 1060).

3. Because Commissioner Oswald was ordered by Governor Rockefeller to assume such great responsibility in handling the uprising at Attica, Mancusi's role as Superintendent was relegated to remaining at his desk in his office so that he could answer the telephone and relay any messages received to the proper party. Mancusi was also bound to comply with whatever request or instructions he received from Commissioner Oswald or Deputy Commissioner Walter Dunbar and to maintain a log of events as they were reported to him. (Mancusi Affidavit p. 3; Report of the McKay Commission pp. 444-45).

4. Attica prison yards A and D were not visible from Mancusi's office and at no time during the retaking did Mancusi view or observe D yard or anything that took place there, nor A yard where the alleged running of the gauntlet during the rehousing took place. (Mancusi Affidavit p. 3).

5. Mancusi's role with respect to the events described in Plaintiffs' Amended Complaint was limited solely to his official capacity as Superintendent of the Attica Correctional Facility. Mancusi neither acted nor failed to act in any other capacity, and Mancusi's only individual actions were reporting to the facility, as his position as Superintendent required, and returning home. (Mancusi Affidavit p. 3).

6. Following the retaking, when control and authority for the prison was returned to Mancusi, everything Mancusi did was solely in his capacity as Superintendent of the facility. The rehousing and subsequent events following retaking and alleged wrongs described in the Amended Complaint were the subject of numerous inquiries by the Attorney General's Office, the Jones Committee of the New York State Assembly, the McKay Commission, the Pepper Committee in the House of Representatives and the Grand Jury Inquiries, and in none of these inquiries was there evidence that Mancusi acted in any capacity other than an official and in a proper manner without attributable wrong of any kind. Mancusi has also been named as a defendant in numerous cases relative to the retaking of the prison. Following the extensive hearings and inquiries and

repeated trials, Mancusi never received any letter of reprimand or censure of any kind. In the trials where Mancusi testified or was named as a defendant, no verdict or judgment of any kind was returned against him. (Mancusi Affidavit pp. 1, 2, 4, 7).

7. By Order of this Court dated October 30, 1979, the Amended Complaint was dismissed as to Defendants Rockefeller, Oswald, Monahan, Baker, O'Hara, Pfeil and Fischer in their official capacities. (Order of the Hon. John T. Elfvin, dated October 30, 1979 pp. 14 n. 8, 16). At the hearing on December 11, 1989, counsel for Plaintiffs conceded that Plaintiffs were suing Defendant Mancusi in his individual capacity only.

8. By Order of this Court dated October 30, 1979, the Amended Complaint was dismissed with respect to Mancusi, except as to that part dealing with "Reprisals", paragraphs 57-71 and that part dealing with "Bad Faith Prosecution", paragraphs 72-87. (Order of the Hon. John T. Elfvin, dated October 30, 1979).

9. With respect to the "Reprisals" section of the Amended Complaint, particularly paragraph 60, and after extensive discovery, Plaintiffs have failed to produce any evidence from the numerous inquiries and prior trials, that Mancusi at any time personally participated in, ordered or permitted with his knowledge any of the following acts to occur:

(a) teargassing of the Plaintiffs except as ordered by those in charge of the retaking;

(b) beating any of the Plaintiffs with fists, sticks, or any other objects;

(c) tripping any Plaintiff or inmate or member of the Plaintiff class in any way;

(d) forcing any Plaintiff or member of the class to be stripped naked except as necessary for strip search prior to being placed in segregation and given back their clothes, which was the normal procedure under such circumstances;

(e) forcing any of the Plaintiffs to run the gauntlet while being struck;

(f) improperly placing any inmates in segregated cells;

(g) removal or destruction of any personal property of the inmates except as inescapably occurred during the retaking;

(h) subjecting the Plaintiffs to verbal or racial abuse at the times described in the Amended Complaint or at any time while Mancusi was Superintendent of the Attica Correctional Facility;

(i) threatening the Plaintiffs with bodily or other harm, specifically, pointing a shotgun or rifle through cell bars or threatening murder at any time to any prisoner.

(Mancusi Affidavit pp. 4-5).

10. With further respect to the "Reprisals" section of the Amended Complaint, particularly paragraph 61, and after extensive discovery, Plaintiffs have failed to produce any evidence from the numerous inquiries and prior trials, that Mancusi at any time ordered, or permitted with his knowledge, the following acts to occur:

(a) chalking capital X-marks on the back of any prisoner;

(b) ordering prisoners to lie motionless balancing shotgun shells or other objects under the threat of murder;

(c) burning the prisoners with lighted cigarettes;

(d) confining prisoners in punitive segregation except as in Mancusi's judgment as Superintendent was necessary for the safety of the facility and the other prisoners.

(Mancusi Affidavit pp. 5-6).

11. With respect to the "Bad Faith Prosecution" section of the Amended Complaint, Mancusi acted only as a witness and not as a prosecutor. The prosecutions were conducted by the special prosecutor, Robert F. Fischer who was present at Attica on September 14, 1971, and participated in the hearing on that same date with respect to (1) prisoner's right to counsel and (2) future criminal prosecutions. (Transcript from hearing on preliminary injunction dated September 14, 1971 before the Hon. John T. Curtin – *Inmates v. Rockefeller*, Civ. No. 75-132E). Fischer and other state officials were in charge of investigating any crimes at Attica during and after the period of the uprising, while Fischer, the Commissioner of Corrections and the Bureau of Criminal Investigations were in charge of investigating and obtaining evidence for any subsequent prosecutions. As such, neither Mancusi nor any member of his staff with his knowledge ever engaged in any such investigation or interrogation of prisoners. Mancusi specifically prohibited any such investigation by his staff. Mancusi never, individually, or in his official capacity as warden, played any role in the alleged bad faith prosecution except as a witness in numerous investigations, hearings and trials. (*Inmates v. Rockefeller*, 453 F.2d 12, 18 (2d. Cir. 1971); Mancusi Affidavit p. 6).

12. By Order of this Court dated October 20, 1980, the remaining allegations of the Amended Complaint were dismissed without opinion as to Defendant Commanding General John C. Baker, of the National Guard which remained after the retaking and provided medical care during the period of alleged reprisals and failure to furnish proper medical care to the inmates. (Order of the Hon. John T. Elfvin, dated October 20, 1980).

13. By Order of this Court dated September 24, 1988, the remaining allegations of the Amended Complaint were dismissed as to Defendant Nelson A. Rockefeller, because:

> [w]ithout any actual personal involvement in unlawful or indiscriminate use of force, [Rockefeller] cannot be

> held to have violated [42 U.S.C.] § S1983 or any other law which as of September 13, 1971 was clearly established.

(Order of the Hon. John T. Elfvin, dated September 24, 1988, at p. 19). Such Order was affirmed by the Second Circuit on September 15, 1989 in *Estate of Rockefeller*, 885 F.2d 1060.

14. With respect to the Amended Complaint generally, during the retaking, Mancusi acted only as Superintendent of the Attica Correctional Facility and not as an individual. During the retaking, Mancusi neither carried nor discharged a firearm or any other weapon, nor did Mancusi at any time strike or harm any inmate in any way. Nor at any time was any torture, beating, or harm inflicted upon any prisoner in Mancusi's presence or with Mancusi's knowledge. (Mancusi Affidavit p. 3).

By /s/Richard E. Moot
Richard E. Moot, for Moot & Sprague on behalf of Defendant Vincent R. Mancusi,

Dated: March 21, 1990

CERTIFICATE OF SERVICE

I, Judith M. Bell, hereby certify that on March 21, 1990, the above motion and notice of motion of the defendant Vincent R. Mancusi and supporting memorandum of law, affidavit of Vincent Mancusi dated February 9, 1990, affidavit of Theresa Smyth dated January 13, 1986 and Rule 13 statement of material facts not at issue were served by mail addressed to all counsel and pro se parties as their names and addresses appear upon the attached list.

/s/Judith M. Bell

JUDITH M. BELL

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

AKIL AL-JUNDI, a/k/a Herbert Scott Deane, et al.,

Plaintiffs

-vs- Civ. No. 75-132E

THE ESTATE OF NELSON A. ROCKEFELLER, et al.,

Defendants

MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT ON BEHALF OF DEFENDANT VINCENT R. MANCUSI

MOOT & SPRAGUE on behalf of
Defendant Vincent R. Mancusi

On the Memorandum

Richard E. Moot
Darryl J. Colosi

Judith M. Bell, L.A.

Dated: March 21, 1990

PRELIMINARY STATEMENT

The present motion, pursuant to Fed. R. Civ. P. 56, moves for an Order: (1) granting summary judgment dismissing the "Reprisals" and "Bad Faith Prosecutions" claims against Vincent R. Mancusi in both his individual and official capacity; (2) in the alternative, for a hearing *in limine* and partial summary judgment on the discreet issue of whether or not Defendant Vincent R. Mancusi was acting solely in his official capacity as Superintendent of the Attica Correctional Facility ("Attica") with respect to the only remaining claims against him, "Reprisals" and "Bad Faith Prosecutions"; and (3) granting summary judgment, dismissing the Amended Complaint in its entirety against all remaining Defendants, under the due process and equal rights constitutional provisions.

PRIOR PROCEEDINGS

This class action arises out of the 1971 prison riot at Attica and the subsequent armed retaking of the prison by various state law enforcement personnel at which time 39 people, including both inmates and hostages, were killed. Plaintiffs instituted this suit in the United States District Court for the Southern District of New York on September 13, 1974, to recover for alleged violations of their constitutional rights resulting from the "retaking" of D-yard at Attica on September 13, 1971. After transfer of the action to this Court on April 1, 1975, Plaintiffs filed an Amended Complaint on September 11, 1975. The Amended Complaint is divided into three sections, the first dealing with the plan to retake D-yard and the actual retaking, the second dealing with "Reprisals" against inmates after the retaking and the third dealing with alleged "Bad Faith Prosecutions" that resulted from the takeover by the inmates of D-yard on September 9, 1971.

By Order of this Court dated October 30, 1979, the Amended Complaint was dismissed as to Defendants Rockefeller, Oswald, Monahan, Baker, O'Hara, Pfeil and Fischer in their official capacities. (Order of the Hon. John T. Elfvin, dated October 30, 1979, pp. 14 n.8, 16). At the hearing on December 11, 1989,

counsel for Plaintiffs conceded that Plaintiffs were suing Defendant Mancusi in his individual capacity only.

By Order of this Court dated October 30, 1979, the first section of the Amended Complaint, which ~~is that~~ part dealing with the "Plan" and the "Assault", was ordered dismissed with respect to Superintendent at Attica, Vincent R. Mancusi. In so ruling, the Hon. John T. Elfvin stated:

> Neither section 1983 nor 1985(3) permits liability to attach to a defendant for acts in which he did not participate or of which he was not aware. (Citations omitted).

(Order of the Hon. John T. Elfvin, dated October 30, 1979, p. 40.)

In the same Order of this Court dated October 30, 1979, however, the "Reprisals" and "Bad Faith Prosecutions" sections of the Amended Complaint remained as to Mancusi. (Order of the Hon. John T. Elfvin, dated October 30, 1979).

By Order of this Court dated October 20, 1980, the remaining allegations of the Amended Complaint were dismissed without opinion as to Defendant Commanding General John C. Baker, of the National Guard which remained after the retaking and provided medical care during the period of the alleged reprisals and failure to furnish proper medical care to the inmates. (Order of the Hon. John T. Elfvin, dated October 20, 1980).

By Order of this Court dated September 24, 1988, the remaining allegations of the Amended Complaint were dismissed as to Defendant Nelson A. Rockefeller, because:

> [w]ithout any actual personal involvement in unlawful or indiscriminate use of force, [Rockefeller] cannot be held to have violated section 1983 or any other law which as of September 13, 1971 was clearly established.

(Order of the Hon. John T. Elfvin, dated September 24, 1988, at p. 19).

Thereafter on September 15, 1989 the Second Circuit affirmed the dismissal of all claims against the Estate of Nelson Rockefeller arising out of the retaking, reprisals, and bad faith prosecutions. *Al-Jundi v, Estate of Rockefeller*, 885 F.2d 1060 (2d Cir. 1989). Although not discussed in either the District Court decision or the decision from the Second Circuit it is significant that the bad faith prosecutions were dismissed against Governor Rockefeller in both Courts. The same section of the Amended Complaint was previously dismissed on the grounds of absolute immunity against the prosecutor Robert F. Fischer. (Order of the Hon. John T. Elfvin, dated April 28, 1980).

Prior to the District Court and Circuit Court's decision in favor of the Estate of Nelson Rockefeller the Defendant Vincent Mancusi had moved for summary judgment dismissing the remaining reprisal and bad faith prosecution claims against himself. The motion was filed January 13, 1986 and was based upon the doctrine of collateral estoppel citing several prior actions in which the Warden Vincent Mancusi was a defendant. The examination of the "Attica room" documents had not been completed at the time and the motion was not supported by a factual affidavit by the Superintendent Mancusi attesting to his lack of personal participation in the alleged reprisals or bad faith prosecutions. The prior Mancusi motion was also made prior to *Whitley v. Albers*, 475 U.S. 312 (1986), and *Will v. Michigan Dept. of State Police*, 109 S. Ct. 2304 (1989), which established new law favorable to Mancusi's position. Neither of these decisions were briefed to the Court nor cited in the Court's Memorandum and Order of April 3, 1987 dismissing the Mancusi motion for summary judgment based upon collateral estoppel.

Defendant Mancusi's prior motion also preceded the judicial expansion of Rule 56 for summary judgment written in the *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-27 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-51 (1986) and

Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp. et al., 475 U.S. 574 (1986) trilogy. See page 1065 of the Circuit Court decision affirming the dismissal of all claims against the Estate of Nelson Rockefeller where the more liberalized rule for summary judgment was relied upon.

STATEMENT OF FACTS

On the morning of September 9, 1971, a substantial portion of the Attica prison was taken over by numerous rioting inmates, during which time a number of corrections employees were seized as hostages. Shortly after the initial rioting, the inmates consolidated their actions in certain portions of Attica, including B-block, D-block, D-yard and the carpenter and metal shops, because a group of armed state law enforcement personnel regained control over the remainder of the prison. (Order of the Hon. John T. Elfvin, dated September 24, 1988, p. 3).

By the afternoon of September 9, 1971, the armed retaking had ceased and it was then decided by Defendant Russell Oswald, then New York State Commissioner of the Department of Correctional Services, who had arrived at the scene that same afternoon, that negotiations would commence in an effort to achieve a peaceful resolution. Defendant Oswald had been given, by Defendant Rockefeller, then Governor of the State of New York, complete authority over and responsibility for handling the crisis at Attica. *Estate of Rockefeller*, 885 F.2d at 1062). Because Defendant Oswald was ordered by Defendant Rockefeller to assume such great responsibility in handling the uprising at Attica, Mancusi's role as Superintendent was relegated to remaining at his desk in his office so that he could answer the telephone and relay any messages received to the proper party. Mancusi was also bound to comply with whatever request or instructions he received from Defendant Oswald or Defendant Deputy Commissioner Walter Dunbar and to maintain a log of events as they were reported to him. (Mancusi Affidavit p. 3; Report of the McKay Commission pp. 444-45).

Defendant Oswald delivered his final plea to the inmates on September 13, 1971 to release the hostages and to help him in

a peaceful restoration of order at Attica. After the inmates had rejected this final plea, Defendant Oswald spoke with Defendant Rockefeller and obtained his approval and authorization to order the New York State Police to enter the prison and retake it, with force if necessary. The retaking ensued and resulted in the deaths of 29 inmates and 10 hostages. (Order of the Hon. John T. Elfvin, dated September 24, 1988, pp. 5,6).

During the retaking and the rehousing which followed, Mancusi on orders from Defendant Oswald remained at his desk in his office. Attica prison yards A and D were not visible from Mancusi's office and at no time during the retaking did Mancusi view or observe D-yard or anything that took place there, nor A-yard where plaintiffs were allegedly forced to run through a gauntlet while being struck. (Mancusi Affidavit p. 3).

POINT I

THERE IS NO JURISDICTION UNDER 42 U.S.C. § 1983 FOR A CLAIM OF MONETARY DAMAGES AGAINST VINCENT R. MANCUSI FOR WHAT HE DID OR FAILED TO DO AS SUPERINTENDENT OF ATTICA

The Plaintiffs would have this court believe that the Supreme Court's decision in *Will v. Michigan Dep't. of State Police*, 109 S. Ct. 2304 (1989), does not constitute a major change in the grounds for a claim under § 1983 and that it has no impact upon this class action seeking to recover compensatory damages in the amount of two billion ($2,000,000,000) dollars. The allegations of the Amended Complaint, the facts of the case, the law and common sense all speak to the contrary. The Amended Complaint states in paragraph 17 "Each defendant is sued individually and in his official capacity for acts and omissions committed and omitted by him by virtue of the power and position granted him by the laws, statutes, ordinances, customs and usages of the State of New York." To say that Vincent Mancusi is being sued individually for acts and omissions by him in his capacity as Superintendent of Attica is a contradiction in terms. To say

that Vincent Mancusi individually without regard to his power or title as Superintendent could possibly be liable to the entire Plaintiff class of 1241 inmates for two billion dollars is an absurdity. There is and has been no case against an individual person awarding a class action recovery of this scope or magnitude.[1] The reason is obvious. It is only in his capacity as Superintendent that Vincent Mancusi could possibly exercise the power to deny all members of the class their rights under the Constitution. Individual police officers or correction officers can be held personally liable for shooting, hitting or punching another person or inmate, *see Gutierrez-Rodriguez v. Cartagena*, 882 F.2d 553 (1st Cir. 1989), but the present Amended Complaint and undisputed facts show that Defendant Mancusi did not personnal participate in any such activity.

The allegations of the Amended Complaint, the nature of a class action and the huge amount of damages sought in this case undeniably constitute an attempted claim by the Plaintiff class against the treasury of the State of New York. *Will v. Michigan* has settled at least at this time that the federal courts have no jurisdiction under § 1983 for such a claim.

Unquestionably the *Will* case has worked a major change in § 1983. Certiorari was granted for that very purpose. The Court stated:

> "The Michigan Supreme Court's holding that a State is not a person under § 1983 conflicts with a number of state and federal court cases that hold to the contrary. We granted certiorari to resolve that conflict."

Will v. Michigan, 109 S. Ct. at 2306-07.

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[1] *Meriweather v. Coughlin*, 879 F.2d 1037 (2d Cir. 1989), was designated a class action but in fact the 15 individual inmates who had complained about denial of their constitutional rights were known by name. It was shown that the Defendant Warden and Commissioner of Corrections personally participated in the selection of the named plaintiffs who were transferred to other prisons and deprived of their constitutional rights during such transfer. Further, *Meriweather v. Coughlin*, was decided on June 30, 1989 and thus, did not have the benefit of the decision in *Will v. Michigan*, which was decided on June 15, 1989.

The Supreme Court pointed out that prior to *Monell v. New York State City Dep't. of Social Services*, 436 U.S. 658 (1978), it has been held that the State was not a person within the meaning of § 1983. The Court went on, "but in *Monell* the Court overruled *Monroe*, [365 U.S. 167 (1961)] holding that a municipality was a person under § 1983. 436 U.S. at 690." *Will*, 109 S. Ct. at 2319

Two vigorous and lengthy dissents can leave no doubt that *Will* has brought a major change in the law. Dissenting Justices Brennan, Marshall, Blackman and Stevens said, "To describe the breadth of the Court's holding is to demonstrate its unwisdom . . . [t]his is indeed an exceptional holding." *Will*, 109 S.Ct. at 2319. Unquestionably, *Will* departs from prior holdings.

Justice Stevens' dissent was even more explicit in pointing out the departure from prior law. He wrote at 109 S.Ct. 2321:

> Under a settled course of decision, in contexts ranging from school desegregation to the provision of public assistance benefits to the administration of prison systems and other state facilities, we have held the state liable under § 1983 for their constitutional violations through the artifice of naming a public officer as a nominal party . . . . An official-capacity suit is the typical way in which we have held States responsible for their duties under federal law.

Under *Will* the established law referred to in the dissenting opinions has now been changed. Suits which are clearly against the State, particularly a class action suit of this nature Seeking billions of dollars in relief, cannot escape the reach of *Will* by a technical nicety of pleading which drops the designation "official capacity" but continues to allege liability against the individual for action he did or did not take in his official capacity.

Common sense cries out against the absurd result sought in this case. Mr. Mancusi not only did not participate personally in any of the alleged wrongs, he did not order them. He did

not see them or permit them to continue in his presence or with his knowledge. For 1241 inmates to claim personal damages against one individual for the alleged acts of physical abuse is absurd. One person couldn't punch that many noses. No one but a demonic mad man would order others to do it for him personally. The only rational basis for a class action claim of this magnitude has to be against the State of New York for actions which state officials took or failed to take in their official capacity. Under *Will* such claims under §1983 are now barred.

POINT II

DEFENDANT MANCUSI IS ENTITLED TO SUMMARY JUDGMENT ON THE UNDISPUTED FACTS WHICH ESTABLISH HE DID NOT PERSONALLY PARTICIPATE IN THE ALLEGED REPRISALS OR BAD FAITH PROSECUTIONS

The undisputed facts developed in *Al-Jundi v. Estate of Rockefeller*, 885 F.2d 1060 (2d Cir. 1989), and on this motion title Defendant Mancusi to summary judgment dismissing the remaining "Reprisals" and "Bad Faith Prosecutions" claims against him.

During the period this action has been pending and since Defendant Mancusi's prior summary judgment motion the basis for granting summary judgment has been greatly expanded. *Estate of Rockefeller*, 885 F.2d at 1065.

In 1986 the Supreme Court decided three cases on summary judgment (F.R.C.P. 56): *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp. et al*, 475 U.S. 574, 106 S. Ct. 1348 (1986); *Anderson v. Liberty Lobby, Inc.*, 106 S. Ct. 2505 (1986); and *Celotex Corp. v. Catrett*, 106 S. Ct. 2548 (1986). These three cases created a more liberal environment for the granting of summary judgment, setting higher standards for the party with the burden of proof at trial. Note, *No More Litigation Gambles: Toward a New Summary Judgment*, 28 B.C.L. Rev. 747, 747 (1987). The Court effectively changed Rule 56 without use of

formal amending procedures to make it easier for courts to grant summary judgment. Stempel, *A Distorted Mirror: The Supreme Court's Shimmering View of Summary Judgment, Directed Verdict, and the Adjudication Process*, 49 Ohio St. L.J. 95, 99 (1988). The Second Circuit has been particularly receptive to the liberalization of the summary judgment requirements. Comment, *Federal Summary Judgment: The "New" Workhorse for an Overburdened Federal Court System*, 20 U.C. Davis L. Rev. 955, 968-69 (1987).

Matsushita

Summary judgment is "mandated" in the absence of a showing by the plaintiff of a plausible economic motive for conspiring. Note, at 764; *Matsushita*, 106 S. Ct. at 1362. Furthermore, to survive this motion, a plaintiff claiming conspiracy must introduce evidence supporting an inference of conspiracy, and must, at the same time, introduce evidence negating the possibility of independent, nonconspiratorial action. Note, at 764; *Matsushita*, 106 S. Ct. at 1357. When presenting this evidence, specific facts, not ambiguous evidence, must be detailed to support a finding that a genuine issue of material fact exists for trial. Note, at 765, *Matsushita*, 106 S. Ct. at 1356, 1362.

Anderson

The Court requires the same substantive evidentiary standard used at trial to be applicable in summary judgment proceedings. Note, at 769-70; *Anderson*, 106 5. Ct. at 2512. To defeat the motion, the existence of "some" alleged factual dispute is not enough; there must be a genuine issue as to a material fact, with "genuine" defined as evidence which would enable a "'reasonable jury [to] return a verdict for the non-moving party'". Note, at 769 (quoting *Anderson*, 106 S. Ct. at 2510). This standard is the same as the directed verdict standard, and must be supported by specific affirmative evidence. Note, at 769, 771; *Anderson*, 106 S. Ct. at 2512, 2514.

One effect of *Matsushita* and *Anderson* is to allow courts to dispose of "state of mind" cases by summary judgment. Note, at 772-73.

Celotex

When the defendant is the moving party and does not bear the burden of proof on an issue at trial, the defendant is not required to support its motions with affidavits or other similar materials negating the plaintiff's claim. Note, at 773-74; *Celotex*, 106 S. Ct. at 2553. The defendant need only show that there is an absence of proof to support the plaintiff's case. Note, at 774; *Celotex*, 106 S. Ct. at 2554. Summary judgment is to be granted to the defendant when the plaintiff has failed to make a showing sufficient to establish a necessary element of his case on which he bears the burden of proof at trial. Note, at 77; *Celotex*, 106 S. Ct. at 2553.

POINT III

THE GENERAL DOCTRINE OF RESPONDEAT SUPERIOR DOES NOT APPLY AGAINST DEFENDANT MANCUSI. A SHOWING OF SOME PERSONAL PARTICIPATION OF DEFENDANT MANCUSI IS REQUIRED.

In *Estate of Rockefeller*, the Second Circuit affirmed the Order of the Hon. John T. Elfvin, dated September 24, 1988, which dismissed all allegations of the Amended Complaint against Defendant Rockefeller because:

> Rockefeller's part in the decision to retake the prison and rescue the hostages, and in the formulation and implementation of the plan to carry out that decision, simply did not rise to the level of personal involvement necessary to establish liability under Section 1983.

Estate of Rockefeller, 885 F.2d at 1065.

This Court on the carefully prepared and voluminous record submitted on the Estate of Nelson Rockefeller's motion for summary judgment found and the Court of Appeals has affirmed that:

1. "Rockefeller did not engage in or authorize any of the brutalities alleged." *Estate of Rockefeller*, 885 F.2d at 1065-66. The same is true for Mancusi. (Mancusi Affidavit p. 3).

2. "True, the Governo. was kept abreast of the events that transpired at the prison throughout the crisis; but that alone is not sufficient to hold him responsible for any wrongs committed by others." *Estate of Rockefeller*, 885 F.2d at 1065. The same is true for Mancusi who on orders by Commissioner Oswald remained in the Superintendent's office where he neither saw nor had knowledge of the alleged reprisals. (Mancusi Affidavit p. 3).

3. "The fact that he was in a high position of authority is an insufficient basis for the imposition of personal liability." *Estate of Rockefeller*, 885 F.2d at 1065 (quoting *McKinnon v. Patterson*, 568 F.2d 930, 934 (2d Cir. 1977), *cert. denied*, 434 U.S. 1087 (1978). The same is even more true for Mancusi whose authority was severely limited during the retaking and subsequent rehousing. (Mancusi Affidavit p. 3).

4. "Nor do Rockefeller's recommendations regarding certain safety measures to be followed during the operation and instructions to the rescue team not to use force unless necessary imply the requisite personal involvement or responsibility." *Estate of Rockefeller*, 885 F.2d at 1066. The same is true for Mancusi with respect to his instructions in connection with the rehousing.

5. "There's no basis for imposing supervisory liability upon the Estate under the circumstances revealed here .... [T]he 'deliberate indifference' standard does not apply in the prison context to the making and carrying out of decisions 'involving use of force to restore order in the face of a prison disturbance.' " *Estate of Rockefeller*, 885 F.2d at 1066 (quoting *Whitley v.*

Albers, 475 U.S. 312, 320 (1986)). The same is true with respect to Mancusi on his decision with respect to segregated housing during a crisis following the retaking.

6. "[W]e find no fault with the District Court's refusal to substitute its judgment 'for that of officials who have made a considered choice.' " *Estate of Rockefeller*, 885 F.2d at 1066 (quoting *Whitley*, 475 U.S. at 322). The same is true with respect to the Defendant Mancusi's judgment with respect to segregated housing.

7. Governor Rockefeller's conduct did not violate clearly established statutory and constitutional rights of which a person would have known and he was therefore entitled to qualified immunity. The Defendant Mancusi is likewise entitled to qualified immunity with respect to his judgment and actions taken during the crisis.

8. "[U]nder the standard articulated by the Supreme Court . . . Al-Jundi did not come forward with sufficient evidence to raise a genuine issue of material facts." *Estate of Rockefeller*, 885 F.2d at 1065. The same is true with respect to the present motion. The Plaintiffs have not and cannot meet the *Celotex*, *Anderson* and *Matsushita* test for a genuine issue of material fact.

Furthermore, in *Johnson v. Glick*, 481 F.2d 1028 (2d Cir. 1973) *cert. denied*, 414 U.S. 1033 (1973) the Court affirmed the dismissal of an inmate's civil rights claim against a prison warden, which alleged, among other things, that a prison guard made an unprovoked attack on the inmate. The Court found that the complaint failed to state a claim against the warden because the complaint did not allege that the warden had authorized the guard's conduct, or even that there had been a history of previous episodes. In reaching its decision, the Court followed the rule in this Circuit that:

> [w]hen monetary damages are sought under § 1983, the general doctrine of *respondeat superior* does not suffice and a showing of some personal responsibility of the defendant is required.

Glick, 481 F.2d at 1034; *see also, Turpin v. Mailet*, 579 F.2d 152, 167 (2d Cir. 1978) (en banc) ("notions of *respondeat superior* have not been incorporated into § 1983 to permit the imposition of liability in damages upon supervisory personnel for the wrongs of their subordinates"), *cert. denied*, 439 U.S. 988 (1978).

Thus, the Plaintiffs' Amended Complaint for monetary damages against Mancusi requires a showing of more than the linkage in the prison chain of command. *Ayers v. Coughlin*, 780 F.2d 205, 210 (2d Cir. 1985) (per curiam), and, as such, the Plaintiffs must show that Mancusi was personally involved in the unconstitutional conduct alleged.

Personal involvement of a state official in alleged constitutional deprivations is a prerequisite to an award of damages under § 1983. *McKinnon*, 568 F.2d at 934 and cases cited therein. Thus, the fact that Mancusi was in a high position of authority as Warden of Attica is an insufficient basis for the imposition of personal liability upon him. *Glick*, 481 F.2d at 1034.

Although a state official may be personally involved in a constitutional deprivation within the meaning of § 1983, it is necessary to allege and show such involvement. The official may have directly participated in the infraction, *see, e.g., Glick*, 481 F.2d at 1033-34 (prison guard liable for beating inmate). A prison warden may be liable for ordering that an inmate be placed in solitary confinement. *Sostre v. McGinnis*, 442 F.2d 178, 205 (2d Cir. 1971) (en banc), *cert. denied*, 404 U.S. 1049, (1972). A supervisory official may be liable when that official learns of a constitutional deprivation through a report or appeal, but fails to remedy the wrong, *see, e.g., United States ex rel. Larkins v. Oswald*, 510 F.2d 583, 589 (2d Cir. 1975). A supervisory official may be liable because that official created a policy or custom under which unconstitutional practices occurred, or allowed such a policy or custom to continue, *see, e.g., McKann v. Coughlin*, 698 F.2d 112, 125 (2d Cir. 1983). Lastly, a supervisory official may be held personally liable under § 1983 when that official has:

> "Actual or constructive notice of unconstitutional practices and demonstrates 'gross negligence' or 'deliberate indifference' by failing to act."

Estate of Rockefeller, 885 F.2d at 1066, quoting Meriwether, 879 F.2d at 1048.

No such personal involvement by Mancusi is alleged in the present case. Mancusi could not possibly have been "personally involved" in the commission of any reprisals against plaintiffs as required by *McKinnon*, 481 F.2d at 934.

As a matter of fact Defendant Oswald and his deputy, Defendant Walter Dunbar, and not Mancusi, had been given "complete authority over and responsibility for handling the crisis." *Estate of Rockefeller*, 885 F.2d at 1062. Mancusi, under direct orders from Defendant Oswald, stayed in his office where he could not see either D-yard where the riot and retaking took place or A-yard where the alleged reprisals and alleged running of the gauntlet occurred during the rehousing in cell block A. (Mancusi Affidavit p. 3).

Moreover, the rehousing and subsequent events following the retaking and alleged wrongs described in the "Reprisals" section of the Amended Complaint were the subject of numerous inquiries by the Attorney General's Office, the Jones Committee of the New York State Assembly, the McKay Commission, the Pepper Committee in the House of Representatives and the Grand Jury inquiries, and in none of these inquiries was there evidence that Mancusi acted in any capacity other than an official and in a proper manner without attributable wrong of any kind. In fact, Plaintiffs have completely failed to produce any evidence from the numerous inquiries and prior trials where Mancusi was named as a defendant, that Mancusi at any time personally participated in, ordered or permitted with his knowledge any of the acts alleged in the "Reprisals" section of the Amended Complaint. Mancusi's moving affidavit categorically and specifically denied any such personal involvement.

Neither the numerous prior inquiries and court proceedings nor Plaintiffs have produced any incriminating evidence at any time over the 19 years since the Attica prison riot occurred, that Mancusi was personally involved with the alleged "Reprisals" or "Bad Faith Prosecutions". Those remaining portions of the Amended Complaint should be dismissed as to him. *See Estate of Rockefeller*, 885 F.2d at 1065-66 (section 1983 claims dismissed as to the Estate of Nelson A. Rockefeller because "Rockefeller did not engage in or authorize any of the brutalities alleged").

CONCLUSION

Notwithstanding extensive discovery and the passage of nearly 19 years since the occurrence of the Attica prison riot, the Plaintiffs have failed to establish any issues of material fact sufficient to prevent summary judgment in Defendant Mancusi's favor.

The undisputed facts show that Defendant Mancusi did not personally participate in any "Reprisals" or "Bad Faith Prosecutions" against the Plaintiffs. Summary judgment for Defendant Mancusi should be granted.

Dated: March 21, 1990

Respectfully submitted,

MOOT & SPRAGUE

By /s/Richard E. Moot

RICHARD E. MOOT, ESQ.
Darryl J. Colosi, Esq.
Attorneys for Defendant
Vincent R. Mancusi

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

AKIL AL-JUNDI, a/k/a Herbert Scott Deane, et al.,

Plaintiffs,

-vs- Civ. No. 75-132E

THE ESTATE OF NELSON A. ROCKEFELLER, et al.,

Defendants.

POST ARGUMENT MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT ON BEHALF OF DEFENDANT VINCENT R. MANCUSI

MOOT & SPRAGUE on behalf of
Defendant Vincent R. Mancusi

On the Memorandum

Richard E. Moot
Darryl J. Colosi

Judith M. Bell, L.A.

Dated: May 31, 1990

THE REASON FOR A POST ARGUMENT MEMORANDUM

This post argument memorandum and supporting affidavit on behalf of Vincent Mancusi is required by reason of Plaintiffs' failure to comply with the rules and procedures governing summary judgment and Plaintiffs' submission of additional signed affidavits and the designation of the material facts constituting genuine issues to be tried for the first time at oral argument.

The signed affidavits of the inmates Rosenberg and Victory which the Plaintiffs claim ". . . give[s] the lie to, and requires a trial by jury of, the claim that the Defendant Mancusi never left his bastion" (Plaintiffs' memo, p. 17) were not filed with the court or furnished to opposing counsel until the time of oral argument, May 10, 1990 (Moot Aff. ¶ 2). Prior to that date on May 2, ten days after the date fixed by the court for the Plaintiffs' answering papers unsigned, undated, unsworn, copies of the subsequent affidavits were received without any explanation for the absence of signatures or whether the affidavits would or would not ultimately be executed and filed. It was not until 17 days later that counsel for Defendant Mancusi knew whether or not this attempted sworn contradiction of his affidavit and moving papers would be filed or not (Moot Aff. ¶ 2).

No reason was given for the failure to comply with the court's scheduling order or the provision of 56(c) for serving opposing affidavits "prior to the day of hearing." No request for additional time was made nor was any application made under FRCP 56(f) for continuance to permit the affidavits to be obtained (Moot Aff. ¶ 3).

The position of the Defendant Vincent Mancusi has been further prejudiced by Plaintiffs' failure at any time to comply with Rule 13 of this court governing motions for summary judgment which requires, ". . . a separate, short, and concise statement of the material facts as to which it is contended that there exists a genuine issue to be tried." To date there has been no explanation

for this failure nor any application or request to waive or put aside the operative effect of Rule 13 which provides, "all material facts set forth in the statement required to be served by the moving party will be deemed admitted unless controverted by the statement required to be served by the opposing party." (Moot Aff. ¶ 2).

It was not until oral argument that the Plaintiffs attempted for the first time to meet the requirements of Rule 13. In responding to the arguments of defense counsel, Plaintiffs' counsel attempted compliance with the rules by designating the "STATEMENT OF FACTS AND EVIDENCE" pages 3 through 18 of its memorandum as the Plaintiffs' Rule 13 ". . . separate, short and concise statement of the material facts as to which it is contended there exists a genuine issue to be tried." (Trans. 5-10-90, pp. 48, 68, 69). This argumentative 15 page "STATEMENT OF FACTS AND EVIDENCE" is repleat with arguments unsupported by any reference to the Plaintiffs' factual material submitted on the motion, Plaintiffs' Appendix Exhibits A to M. The factual record required by Rule 56 of the Federal Civil Procedure and Rule 13 of this court which is necessary for this court's decision and ultimate review by the Court of Appeals is simply not present.

This is not just a matter of form or technicality. Without such a statement the very purpose of Rule 56 is frustrated. The moving party has no opportunity to show the claimed genuine issues of fact are not present because none have been designated. The trial court is left in a quagmire of argument and no record for review is available. If summary judgment may be defeated in this manner, Rule 56 becomes totally emasculated. As discussed below the Supreme Court has recently greatly strengthened not weakened Rule 56. This Court's Rule 13 provides that the moving party's statement of fact is deemed admitted if not "controverted by the statement required to be served by the other party". This provision recognizes the Supreme Court's new, more forceful application of Rule 56 in weeding out meritless cases or particular issues which should not occupy the court's time at the expense of pressing matters which must be tried.

THE ROSENBERG AND VICTORY AFFIDAVITS

Plaintiffs' bound by the Second Circuit's holding in the dismissal in favor of the Rockefeller Estate, that the doctrine of deliberate indifference did not apply in this riot situation and that the governor was entitled to the doctrine of qualified immunity, had to find a more direct connection or individual participation on the part of the superintendent Vincent Mancusi. Although Plaintiffs' counsel have insisted for more than a year that they were fully prepared for trial and fully conversant with millions of documents which they had studied for thousands of hours over two and one-half years (Fink Aff. of November 13, 1985, Doc. No. 167), they still had no document or no testimony showing participation or direct knowledge on the part of Vincent Mancusi with respect to the remaining reprisal charges. Mr. Mancusi's detailed factual affidavit categorically states item by item his lack of direct involvement or knowledge with respect to the alleged acts of reprisals and brutality. (Mancusi Aff. of February 9, 1990, Doc. No. 304). A further supporting affidavit by Theresa Smythe details the particulars of five other Attica uprising federal court cases and 16 individual court of claims cases. In all 79 individual inmates are identified in these cases. None of these inmates in any of these cases nor any other witness has ever stated that Mr. Mancusi was present on the catwalk or in any other part of A yard and had witnessed the alleged reprisals and brutalities. Nowhere in the television, magazine, newspaper accounts, the Attorney General's investigation, the Jones Committee of the New York State Assembly Investigation, the McKay Commission, the Pepper Commission in the House of Representatives or in the Grand Jury Inquiries have the Plaintiffs found any such evidence. On the contrary the official McKay Report, a portion only of which Plaintiffs' counsel provided to the court under Exhibit D, specifically concluded that Vincent Mancusi "whether ordered or not, remained at his desk throughout the day." In fact Plaintiffs' counsel in their prior memorandum to this Court stated with the certification under Rule 11 that Mr. Mancusi did *not* observe the reprisals or brutalities and never "went into the prison that day to observe what was going on." (Plaintiff's Memorandum in Opposition to

Defendant and State's Motion for Summary Judgment of November 26, 1987, Doc. No. 278).

The only evidence to the contrary was evidence produced in writing and sworn to for the first time almost twenty years after the event at the urging of Plaintiffs' counsel who were desperate and without the required material facts as to which a genuine issue existed. On May 3, 1990, ten days after their time to respond to Vincent Mancusi's motion papers had expired, the desperation Rosenberg and Victory affidavits were obtained and thereafter produced at oral argument for the first time (Moot Aff. ¶ 2).

Aside from the timing and circumstances under which these affidavits were obtained the alleged "affidavits" are manifestly inadequate to raise a genuine issue of material fact at this time. As the supporting affidavit of Richard E. Moot and reference to the record in *Inmates of Attica v. Rockefeller* shows, 100 or more inmates were repeatedly questioned by counsel. (Moot Aff. ¶ 10(g). In all 1600 inmates were interviewed by the McKay Commission. (Ex B to Moot Aff.). It is not necessary to read these privileged interviews. The conclusion of the McKay Report that Mr. Mancusi remained at his desk is what is important. There is no presumption of error in this conclusion or reason to test the McKay Report by trying this case. The Rockefeller motion for summary judgment and the statement of 42 uncontested material facts rested largely on the McKay Report 32 out of the 42 numbered paragraphs cited the McKay Report (Moot Aff. ¶ 4). This Court and the Court of Appeals both found no reason to go behind the McKay findings. The Plaintiffs themselves on the present motion embrace and cite *McKay* (Exs. D, F, G, H and I of Plaintiffs' Appendix).

Jerome Rosenberg was serving a life sentence and was well known to the authorities and other prisoners as a jail house lawyer (Plaintiffs' Appendix Ex. J, Rosenberg Aff. ¶ 2). Nowhere does the inmate Rosenberg or Victory state that he ever testified under oath in a prior proceeding of any kind that the Defendant Mancusi was on the catwalk and saw the brutalities taking place.

Nor do either Rosenberg or Victory say they ever gave such information to any investigative body, a member of the observer's committee, their lawyer or any other living person (Plaiantiffs' Appendix Ex. J). The two alleged affidavits are nothing more than a naked assertion by two of the Plaintiffs' that they now remember the critical evidence without which their case and the hoped for recovery of a $1,000,000 in damages apiece would fail. None of the named Plaintiffs' in this case nor any of Plaintiffs' named in any of the other cases enumerated in the Smythe affidavit have furnished any such information. Nor do Plaintiffs' claim that the observers who were friendly to the inmates and who were present in the second floor of the administration building next to Mr. Mancusi's office have ever given any such testimony. As a matter of law these two attempted affidavits by Plaintiffs' on the eve of the dismissal of their claim cannot justify a trial under the expanded doctrine and power of the court to grant summary judgment in the Supreme Court Cellotex trilogy of cases.

These desperation Plaintiff-Inmate affidavits are at best just further evidence that nowhere in the years of investigations, grand jury proceedings, numerous trials and thousands of documents is there any evidence supporting Plaintiffs' remaining claims against Defendant Mancusi.

POINT I

UNDER THE SUPREME COURT'S SUMMARY JUDGMENT TRILOGY PLAINTIFFS' DESPERATE ATTEMPT TO CREATE AN ISSUE OF FACT AFTER ALMOST TWO DECADES OF LITIGATION MUST BE REJECTED.

The 1986 Supreme Court summary judgment trilogy: *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp. et al.*, 106 S.Ct. 1348 (1986); *Anderson v. Liberty Lobby, Inc.*, 106 S.Ct. 2505 (1986); and *Celotex Corp. v. Catrett*, 106 S.Ct. 2548 (1986) are particularly applicable to Plaintiffs' desperation attempt to create an issue of fact by submission upon oral argument.

These three cases created a more liberal environment for the granting of summary judgment. *No More Litigation Gambles: Toward a New Summary Judgment*, 28 B.C.L. Rev. 747, 777 (1987) summaries the effect:

> "The standards for granting summary judgment enunciated in *Matsushita*, *Anderson*, and *Celotex* suggest that the Court increasingly is receptive to the use of Rule 56 for early disposition of claims where no genuine factual issue exists. These three Supreme Court decisions offer encouragement for the trial courts to utilize the summary judgment procedure in all cases, and especially in cases where the propriety of its use has been unsettled."

Stempel, *A Distorted Mirror: The Supreme Court's Shimmering View of Summary Judgment, Directed Verdict, and the Adjudication Process*, 49 Ohio St. L.J. 95, 107 (1988) comments on the trilogy as follows:

> "Courts viewing summary judgement motions in the aftermath of this trio of cases have listened to their music, even if not pausing long enough to hear the words. The essential message of the Supreme Court has been: "Loosen up. Forget old dictum too solicitous of nonmovants. Court congestion is a problem. If trial courts start aggressively granting summary judgment, we are reluctant to second-guess them as might less enlightened circuit panels." Taking the cue, district and circuit courts have entered summary judgment in tough cases, have declared their allegiance to the *Liberty Lobby* dicta, and have invited litigants to make summary judgment motions, suggesting that courts will usually grant them. Although system-wide empirical data is not readily available, it seems likely that the momentum of these cases, particularly *Liberty Lobby*, is having an effect on federal court practice, making summary judgment easier to obtain and involving trial judges in more activities that look suspiciously like pretrial factfinding."

The Second Circuit has been particularly receptive to the liberalization of the summary judgment requirements. In *Knight v. U.S. Fire Ins. Co.* 804 F. 2d 9,12 (2nd Cir. 1986) the Second Circuit embraced the rule and cited empirical data from a recent study by the Second Circuit Committee on the Pretrial Phase of Civil Litigation and said:

> "The Committee analyzed the published and unpublished decisions of the Second Circuit for the period from July 1, 1983 to June 30, 1985 and found that the affirmance rate on appeals from orders granting summary judgment was 79%. Final Report of the Second Circuit Committee on the Pretrial Phase of Civil Litigation 16-17 (June 1986). Thus it is evident that grants of summary judgment are upheld on appeal on most cases. That figure is comparable to this circuit's 84% affirmance rate for appeals in civil cases generally."

The remaining claims against defendant Mancusi must be dismissed in light of the undisputed facts developed in *Al-Jundi v. Estate of Rockefeller*, 885 F.2d 1060 (2d Cir. 1989), and in light of the Supreme Court trilogy. The introduction by plaintiffs of the Victory and Rosenberg affidavits are nothing more than a desperate attempt to create an issue of fact where none previously existed. In 1987 Plaintiffs' own counsel, after exhaustive study, stated Mr. Mancusi did not observe the brutalities (Plaintiffs' memorandum in opposition to Defendant Estate's motion for Summary Judgment p. 9 and 10).

The conclusion of the McKay Commission Official Report was that Mancusi was not on the catwalk on September 13, 1971, but rather, "remained at his desk throughout the day making entries in a log." (Ex A to Moot affidavit). This conclusion by the McKay commission is supported by interviews of approximately 1600 inmates, between 400 and 450 correction officers, 270 state police personnel who participated or had direct knowledge of the riot, 100 sheriffs, undersheriffs and deputies who were inside the walls, Commissioner Russell G. Oswald,

and Deputy Commissioner Walter Dunbar, 24 citizen observers and state legislators who were at Attica, 200 National Guardsmen with first hand knowledge of the material facts including Commanding General John C. Baker and his staff, and Governor Rockefeller and his staff. (Ex B to Moot affidavit). Plaintiffs themselves rely on this report. Five of the thirteen exhibits in Plaintiffs' own Appendix on this motion come from *McKay*. These exhibits and plaintiffs' prior position by memorandum both discredit the offered Victory and Rosenberg affidavits. As the court pointed out in *Anderson v. Liberty Lobby, Inc.* 106 S.Ct. 2505, 2514 (1986); ". . . discredited testimony is not [normally] considered a sufficient basis for drawing a contrary conclusion."

The plaintiffs have produced no evidence over the entire 18 year period since the inception of this lawsuit, which contradicts the conclusion of the McKay Commission and the sworn grand jury testimony of Vincent Mancusi (Ex M Plaintiffs' Appendix) and Mr. Mancusi's affidavit that he remained at his desk on September 13, 1971, save the affidavits prepared by Victory & Rosenberg. Both Victory and Rosenberg are plaintiffs in this action who seek to recover over $1 million damages apiece. As such, the plaintiffs have done no more than create a "metaphysical doubt" as to whether Mancusi remained in his office on September 13, 1971. "This factual context renders" the Plaintiffs' Victory and Rosenberg claim "implausible". (See *Matsushita*, 106 S.Ct. at 1356).

Conclusion

The *Matsushita* case is particularly instructive in meeting Plaintiffs' claim that Defendant Mancusi observed and condoned the brutalities. *Matsushita*, like *Akil Al-Jundi*, had been the subject of exhaustive litigation and documentation. The joint appendix filled 40 volumes, p. 1351. Notwithstanding the magnitude of the case and motion papers, the court accepted Defendant's claim that there was an "absence of any apparent motive and . . . no trier of fact reasonably could find the conspiracy with which petitioners [Defendant's] are charged

existed", p. 1357. Likewise, the proof that Mr. Mancusi observed the brutality as Plaintiffs Victory and Rosenberg claim, simply does not exist.

In *Matsushita* the court also pointed out, " . . . the absence of any plausible motive to engage in the conduct charged is highly relevant to whether 'a genuine issue for trial' exists", p. 1361. The same absence is present here. There is no motive shown for Mr. Mancusi to observe and condone the acts of brutality which he had sought to prevent by relieving certain correction officers and sending them home. Such intent or action by Defendant Mancusi to inflict cruel and unusual punishment upon the inmates would make the prison ungovernable and destroy his outstanding record as a superintendent upon the eve of his retirement. Such a claim, in the words of *Matsushita*, p. 1356 "simply makes no . . . sense."

The Victory and Rosenberg affidavits must be rejected and Defendant Mancusi's motion for summary judgment should be granted.

Respectfully submitted,

/s/Richard E. Moot

Richard E. Moot

Attorney for
Defendant Vincent Mancusi

Dated May 31, 1990

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

AKIL AL-JUNDI, a/k/a Herbert Scott Deane, et al.,

Plaintiffs,

-vs- Civ. No. 75-132E

THE ESTATE OF NELSON A. ROCKEFELLER, et al.,

Defendants.

Affirmation of Richard E. Moot and Exhibits in Further Support of Defendant Mancusi's Motion for Summary Judgment

I, RICHARD E. MOOT, counsel for defendant Vincent R. Mancusi, submit this affirmation in response to plaintiffs' attempt at oral argument to create material issues of fact requiring a trial by presenting two additional signed affidavits and designating material facts as to which it is contended there exists a genuine issue to be tried. The following facts and documents are submitted in response to plaintiffs' submissions and claims made for the first time upon oral argument.

1. Prior to oral argument on May 10, 1990 the Court had fixed April 23 as the last day for the plaintiffs to file answering papers to the defendant Vincent Mancusi's motion for summary judgment which was served and filed March 20, 1990.

2. On May 2, 1990, nine days after the time fixed by the Court for plaintiffs' response, plaintiff filed a memorandum entitled, "PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT" with an accompanying, "PLAINTIFFS' APPENDIX". Included in the Appendix were two undated, unsigned, unsworn documents entitled "AFFIDAVIT IN OPPOSITION" under the names of two

inmate-plaintiffs Albert Victory and Jerome Rosenberg. The opposing papers did not include any, "separate, short, and concise statements of the material facts as to which it is contended that there exists a genuine issue to be tried" as required by Rule 13 of the Court. No explanation was given with respect to the undated, unsigned, unsworn documents nor was any request made of me, as counsel, or to my knowledge, of the Court for a continuance for additional time pursuant to Rule 56(f) of the Federal Rules of Civil Procedure so that affidavits could be obtained. An examination of the Court's docket sheet shows that none of the plaintiffs' opposing papers were filed with the Court until May 9. The record further shows signed and sworn affidavits of Albert Victory, Jerome Rosenberg and their attorney, Elizabeth Fink were not filed until the time of argument, May 10, 1990 when they were also furnished to opposing counsel.

3. Following oral argument by defense counsel which covered both the absence of any material factual issue and the provision of Rule 13 which states, "all material facts set forth in the statement required to be served by the moving party will be deemed admitted unless controverted by the statement required to be served by the opposing party", plaintiffs for the first time attempted to designate the "material facts as to which it is contended that there exists a genuine issue to be tried." This was done by plaintiffs' counsel oral reference to the, "Statement of Facts and Evidence" in plaintiffs' memorandum entitled "PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT". This argumentative 15 page portion of plaintiffs' memorandum fails to meet any of the requirements of Rule 56 or of Rule 13 of this Court. The designation of undisputed facts orally at the time of argument strips defense counsel of an appropriate opportunity to respond and the Court is left on its own to search the voluminous and inadequately cited record in the present case to determine whether or not there is a genuine issue as to any material fact which requires a trial.

4. Following the oral argument I immediately undertook an inquiry to determine the validity and truthfulness of the

Victory and Rosenberg affidavits. At the very threshold I found out that according to Exhibit D to the plaintiffs' own appendix, the McKay Commission Official Report, the statement in the Victory and Rosenberg affidavits that defendant Vincent Mancusi was watching the reprisals and brutalities from the catwalk was simply not true. The portion of the McKay Commission Official Report included by the plaintiffs as Exhibit D in their appendix ended with page 442. Two pages later in the same McKay Commission Report at pages 444 and 445 is the conclusion of the McKay Report, "Ordered or not, Mancusi remained at his desk throughout the day making entries in a log." (Ex. A to Moot Aff.)

5. This conclusion by the McKay Commission that Mr. Mancusi was not on the catwalk but remained at his desk as he stated in his affidavit is supported by interviews of approximately 1600 inmates, between 400 and 450 correction officers, 270 State Police personnel who participated or had direct knowledge of the riot, 100 sheriffs, undersheriffs and deputies who were inside the walls, Commissioner Russel G. Oswald, and Deputy Commissioner Walter Dunbar, 24 citizen observers and state legislatures who were at Attica; 200 National Guardsmen with first hand knowledge of the material facts including Commanding General John C. Baker and his staff, and Governor Rockefeller and his staff (Ex. B to Moot Aff.)

6. This comparison of the McKay Report, plaintiffs' own Exhibit D, which was based upon the interviews of 1600 inmates completed less than 6 months from the date of the riot with the recollection of two inmates Victory and Rosenberg, both plaintiffs in this action seeking over $1 million damages apiece shows that the recollection of Victory and Rosenberg on May 3, 1990, more than 18 years after the riot must be erroneous and unworthy of belief. Mr. Mancusi was as he has stated in his moving affidavit, at his desk as the McKay Commission has found and reported. He was not on the catwalk and did not observe the brutalities.

7. This Court, the Court of Appeals and both parties, Plaintiffs and the Rockefeller Estate, have made the McKay Report

a central part of the record in this case. 32 of the 42 separate uncontested factual statements in the Estate's summary judgment papers cited *McKay* (Estate's Statement of Facts As To Which There is No Genuine Issue of August 12, 1987, Doc. No. 272). These factual statements were adopted by this Court and the Court of Appeals.

8. Plaintiff's own memorandum filed in opposition to defendant Rockefeller's motion agreed with McKay. At pages 9 and 10, plaintiffs previously stated to the court, "Neither Oswald, Mancusi nor any of the governor's people ever went into the prison that day to observe what was going on." (Plaintiffs Memorandum In Opposition to Defendant Estate's Motion For Summary Judgment of November 26, 1987, Doc. No. 278). This prior conclusion of plaintiff's counsel was based upon two and a half years and thousands of hours examining Attica documents. (Fink Aff. of Nov. 13, 1985, Doc. No. 167) and Ms. Fink's personal knowledge of the Attica uprising since July 4, 1974, when she joined the Attica Brothers Legal Defense (Ms. Fink Aff. of April 2, 1981, Doc. No. 102). The undisputed photographs show Mr. Mancusi could not see D yard or A yard from his office in the Administration Building (Ex. C and D).

9. Next in my inquiry I checked with the Attorney General's Office to determine whether in fact the plaintiffs Victory and Rosenberg were still incarcerated in a New York State Correctional Facility and whether or not they had executed affidavits on May 3, 1990 as indicated on the affidavits filed with the Court and furnished to opposing counsel at oral argument on May the 10th. It was reported to me that both plaintiffs were in fact inmates in New York facilities and had according to the Attorney General's report been visited on May 3 by plaintiffs' counsel, Elizabeth M. Fink.

10. Having determined that the signature and oath of the Victory and Rosenberg affidavits was according to the report which I had received, genuine, I turned to the original Court records of the United States District Court and proceedings commencing

September 14, 1971, the day following the riot. In that case *Inmates of the Attica Correctional Facility, Mariano Gonzales, Peter Butler on behalf of themselves and all other persons similarly situated, v. Nelson Rockefeller, Governor, the State of New York: Russell G. Oswald, Commissioner of Corrections of the State of New York; Vincent Mancusi, Superintendent of Attica Correctional Facility*, Civ. 1971-410 which was heard by Judge Curtin, hearings were held beginning September 14, 1971, the day following the uprising and concluded on October 6. I personally read all of that testimony to determine whether or not as claimed by the plaintiffs Victory and Rosenberg in their May, 1990 affidavits there was any evidence that Mr. Mancusi who was a defendant in that case, was on the catwalk and had observed the reprisals and brutalities as claimed for the first time on oral argument, May 10, 1990. I found that there was absolutely no such evidence, none of the witnesses who testified placed Mr. Mancusi other than in his office recording the events of the day in his log from 7:08 a.m. until 5:30 p.m. Well before 5:30 p.m. the brutalities and running of the gauntlet had taken place and the prisoners had been returned to and locked in their cells. The *Inmates* hearing concluded on October 6, 1971 with Judge Curtin's findings on page 578 that, "There is no evidence," however, before the court that Mr. Mancusi or others in supervision countenanced or knew about any improper behavior. (Curtin Decision 10/6/71 p. 578, Ex. E Moot Aff.)

11. My examination of the pleadings, documents, sworn testimony and records in this original *Inmates* case against Rockefeller, Oswald and Mancusi further established the following.

(a) The three issues being heard and determined by Judge Curtin were: (1) the wrongful destruction of property; (2) whether the action should be certified as a class action; (3) the alleged physical abuse amounting to denial of the inmates' rights under the Eighth Amendment (Hrg. 9/30/71, p. 3-4 Ex. F to Moot Aff.)

(b) Mancusi was asked to explain the reason for his order that emotionally disturbed correction officers should be sent home and not allowed back in the prison following the retaking while the rehousing was in progress. He replied:

> A. Because I wanted to make sure that there was no officer who had been in an emotional state which would result in mistreatment or mishandling of any inmates. (Tr. 9/30/71, pp. 27-28 Ex. G to Moot Aff.)

He further testified that eight correction officers were sent home and that no incident triggered the decision which correction officers would be sent home. (Tr. 9/30/71, p. 36 Ex. H to Moot Aff.)

(c) The inmate Lott testified that following the retaking the State Police Officer in charge gave the orders. He also testified that the State Troopers and the Guards moved the inmates to their new cell and that it was a State Trooper who put a gun to his head (Tr. 9/30/71, pp. 46, 50, 51 Ex. I to Moot Aff.)

(d) Inmate Charles Colvin testified that he saw inmates beaten by officers and State Troopers but that it was a State Trooper who marked him on the back with an "X". (Tr. 10/4/71, p. 265 Ex. J to Moot Aff.) Mancusi testified that he had been told some prisoners were marked with an "X" and found out that it was so and that it was a State Police procedure. (Tr. 10/4/71, p. 392-395 Ex. K to Moot Aff.)

(e) The inmate Gary Hines also testified as to the brutality and in particular, that he was kicked by a State Trooper and ordered to strip. That he was lying on his back with a shotgun shell on his knee and that State Troopers on the catwalk were spitting on him and threw a lighted cigarette on him. (Tr. 10/4/71, pp. 322-325 Ex. L to Moot Aff.)

(f) Upon the conclusion of the proof, Judge Curtin defined the questions before the Court:

> The questions before this Court do not concern the riot itself or its suppression, but rather the treatment of prisoners beginning on the morning of the 13th. (Tr. 10/6/71, p. 559-560 Ex. E to Moot Aff.)

Judge Curtin pointed out that the testimony of the witnesses was taken on six days and numerous affidavits were submitted. He also noted that the inmates testifying had consulted with lawyers at least two times. He concluded that confinement in the segregated HBZ cellblock was not cruel and unusual punishment and that there was no evidence Mr. Mancusi countenanced improper behavior by the correction officers. (Tr. 10/6/71, pp. 575-578 Ex. E to Moot Aff.)

(g) The Second Circuit summarizing the Record on Appeal, pointed out a 100 inmates were interviewed by attorneys between September 17 and September 21, 1971 and that 195 interviews had taken place between September 17 and October 2, 1971. (*Inmates of Attica Correctional Facility v. Rockefeller*, 458 F.2d 12 (1971) at pages 16 and 18).

12. My examination of the Docket Sheet and record in the *Inmates* case, Civ. 71,410, further showed that following Judge Curtin's decision of October 6, 1971, denying a preliminary injunction, the case was appealed and reversed in part ordering an injunction against further abuse and reprisals be entered. On December 14, 1971, Judge Curtin signed and entered such an injunction enjoining physical abuse and permitting the plaintiffs to maintain a class action on claim for injunctive relief against brutality. Thereafter, a series of contempt proceedings were initiated with respect to events which took place after the rehousing which are not germane to the remaining charges in the instant case against Vincent Mancusi with respect to reprisals and bad faith prosecutions. These concluded September 10, 1972 with no criminal contempt.

13. The record also shows that the inmate plaintiff Jerome Rosenberg played an active role in the uprising and the subsequent *Inmates* case before Judge Curtin. He was, as he stated

in his May 3, 1990 affidavit and as the *Inmates* record showed, a jailhouse lawyer well known to the Attica staff and members of the observers committee. He was according to his own statement and the *Inmates* record, legal advisor at the negotiating table. He submitted a signed affidavit dated February 23, 1972 in subsequent contempt proceedings (Ex. M to Moot Aff.) but nowhere does it appear in the *Inmates* record or in his own May 3, 1990 affidavit that at any time to any person in any proceeding or at any place in any sworn testimony that the plaintiff-inmate Rosenberg had said or testified that he saw defendant Mancusi on the catwalk until plaintiffs' counsel obtained his affidavit May 3, 1990 more than 19 years after the riot and only 7 days before argument of defendant Mancusi's motion for summary judgment.

I affirm under the penalty of perjury that the foregoing statement is to the best of my knowledge and ability true and correct.

/s/Richard W. Moot
Richard E. Moot

Executed on May 31, 1990.

CERTIFICATE OF SERVICE

JUDITH M. BELL hereby certifies that she served the within Post Argument Memorandum in Support of Motion for Summary Judgment on Behalf of Defendant Vincent R. Mancusi and Affirmation of Richard E. Moot and Exhibits in Further Support of Defendant Mancusi's Motion for Summary Judgment by mailing a true copy to such persons on the 31st day of May, 1990.

/s/Judith M. Bell

Judith M. Bell

Enclosure

SERVICE LIST

Al-Jundi, et al. v. Estate of Rockefeller

File No. 83-0055-000 / 4207-1

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McKAY COMMISSION REPORT, pp. 442-449

ATTICA

... inmates in D yard suffered injuries to the head or groin, or not less than four abrasions, contusions, or lacerations in other parts of the body. More serious injuries included two fractured ribs, two broken elbows, and a broken arm, deep lacerations of the scalp and neck, and contusions of the groin and testicles.[6]

Other diagnosis notes concerning various inmates made by the examining doctor included "multiple bruises"; "needs X ray for possible rib fracture"; "contusions – scalp, chest"; "lacerations left hip," "shotgun wounds – left lower leg, abrasions both hips, contusions left triceps"; "broken nose, bullet wound right knee, small abrasions of back"; "lacerations, infected skull"; "first-degree burns buttocks, possible fracture little finger."

The findings of the panel's doctor were compared by the Commission with a random sample of 240 reports of interviews with inmates who had been in D yard. One-half of the inmates in the sample stated they had been struck after the assault, and 10 percent said they were not. The remaining 40 percent either refused to talk about reprisals or refused to be interviewed. Overall, approximately 10 percent of all inmates contacted by the Commission refused to be interviewed concerning the uprising, including the 80 alleged leaders.

Many of the 700 D yard inmates also complained to the Goldman Panel doctors of losing their eyeglasses or false teeth during the rehousing process. The Attica clerk informed the Commission in April 1972 that 75 dentures and 310 pairs of glasses lost during the riot had been replaced by the state. There

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[6] Members of the Goldman Panel told the Commission that the examinations conducted by some of the volunteer doctors were not as thorough as the panel had hoped they would be. In addition, the examinations were made eight days later when many bruises and cuts would have healed. It would appear therefore, that the statistics prepared on the basis of the doctors' observations are conservative in estimating the extent of reprisals.

are no existing statistics about whether similar replacements were made for Attica inmates transferred to other prisons after the riot.

Where They Were and What They Were Doing, According to Them

Supervisory officials at Attica did not wield nightsticks on Monday. But they could have prevented their use by angry law enforcement officers, who anesthetized their humanity and became righteous vigilantes. The officials' failure was not satisfactorily explained by their later testimony before the Commission, which contained disturbing contradictions:

- The Commission was told by Oswald and Dunbar that reprisals after prison disturbances were a historic problem, but they testified they had made no plans to prevent them.

- The subject of reprisals "was not discussed," said Robert Douglass, Secretary to Governor Rockefeller. Yet concern with the correction officers' emotional control caused officials to exclude them from the assault plan.

- Dead hostages and untrue atrocity rumors after the assault increased the potential for revenge. Rather than seeking to verify the rumors, officials helped circulate them.

- The gauntlet was witnessed early in the day by officials. Yet correctional officials took no action to stop it. Even when they acknowledged some correction officers had been ordered from the prison on Monday, officials denied it had anything to do with reprisal incidents.

- State officials testified that they did not tour HBZ on Monday. But it was understood the suspected leaders would be taken there as soon after the assault as they were found.

- Each official testified he was confident that correction personnel had been supervised during the rehousing of inmates on Monday. Yet each official pointed down to the next bureaucratic rung in placing the responsibility for supervision.

Commissioner Oswald testified he heard on Monday only that law enforcement officers "were running [inmates] through the tunnel, merely prodding them with their batons on the buttocks [and not] striking them . . . It was much like a fraternity hazing." Oswald's testimony is not borne out by the eye witness account of Senator Dunne, who testified that he and Dunbar had seen the gauntlet of correction officers striking inmates in A tunnel (see p. 434). Dunne testified he was "shocked, disgusted, and horrified" by what he saw. When he returned to Mancusi's office, about an hour later, Dunne testified, he told Robert Douglass, Governor Rockefeller's secretary, about the gauntlet. According to Dunne, Douglass reacted to the gauntlet in the same manner that Dunne had, and Dunne subsequently overheard Douglass caution Oswald and Dunbar on the importance of avoiding further reprisal incidents.

Although Dunbar confirmed that he had accompanied Senator Dunne on the tour of A block and the catwalks, Dunbar testified he "had no recollection" of having seen the gauntlet which shocked Dunne. Dunbar recalled at the Commission's hearings that he had seen only one incident where a correction officer struck an inmate, which he related to Oswald when Dunbar and Dunne returned to Mancusi's office.

No action was taken by officials in response to Dunne's report.

The officials' inattention to these reports is difficult to understand, because they were aware of the correction staff's emotional mood after the assault. Senator Dunne remembered Superintendent Mancusi had tried to calm a distraught correction sergeant when true reports of hostage deaths and false accounts of atrocities were received in the command post during the hour following the assault. "Pull yourself together," Mancusi said, "you are an example for the others."

At 10:35 A.M., after Mancusi sought to calm the sergeant, his log notes he ordered the sergeant to "restrain correction officers [and not to] let them go inside [the prison] until discipline can be assured." He logged another order at 10:40 A.M. that only corrections personnel who "can maintain self-control and personal discipline will be allowed into the prison. If the supervisor has any doubts of a man's ability to control himself, he should not be permitted in." Again at 11:25 A.M., he recorded an order to Deputy Superintendent Vincent to "screen correction officers for discipline and self-control."

Superintendent Mancusi testified he received no reports of reprisals and that his orders to screen correction officers were only precautionary. "People's emotions were very high. They were worn out, emotionally upset. I wanted to see that no reprisals were made." Mancusi did not observe the rehousing of inmates. He testified he was "directed [by Oswald] to get a gas mask, to stay at [his] desk and transmit orders through the institution by telephone or otherwise." Oswald testified he was sure he did not give Mancusi these orders. Ordered or not, Mancusi remained at his desk throughout the day, making entries in a log.

Other state officials testified that the possibility of reprisals did not occur to them, although they acknowledged the assault plans excluded correction officers because of a concern with reprisals. "Frankly, I had no reason to expect the correction officers would respond in any way but an honorable one in dealing with the prisoners." Oswald later testified at the Commission's public hearings.

However, in an interview, Wim Van Eekeren, Deputy Commissioner of the Department of Correctional Services, stated he had been instructed by Dunbar prior to the assault to formulate plans which would allow the transfer of the rioting inmates to other prisons immediately after order was restored. According to Van Eekeren, inmates were to be taken from D yard, strip-searched, given new clothing, and loaded on buses. Van Eekeren said Dunbar told him the transfers were necessary in order to

eliminate prolonged contact between correction personnel and the rioters. Van Eekeren added that the plans were changed before the assault, because of the proposed "investigation." He did not recall who changed the plans.

Van Eekeren's statements are consistent with various "hot-line" conversations recorded as early as Saturday, in which he was making arrangements for clothing, buses, and accommodations at other prisons for a thousand inmates from Attica. If Commissioner Van Eekeren's recollection is accurate, the one plan which the correction officials did consider for avoiding reprisals was nullified in order to facilitate the interrogations of inmates by criminal investigators.

The Commission believes that the responsibility for upholding the law and precluding vigilante "justice" by law enforcement officers existed at all levels of command at Attica. But when questioned concerning their role in preventing reprisals, state officials inevitably testified that another official bore that responsibility.

Robert Douglass, Secretary to Governor Rockefeller, did not tour the prison after the assault. He later observed: "We had Commissioner Oswald on the scene at the facility. We had his deputy, Walter Dunbar, who spent a lifetime at this, on the scene at Attica. I had complete confidence that the aftermath of the retaking would be handled appropriately." Commissioners Oswald and Dunbar stated they assumed it was Superintendent Mancusi's responsibility, because, as Oswald testified, "Superintendent Mancusi was . . . still running the correctional officer staff and was still responsible for that part of the operation. We had given orders. We presumed they would be carried out." Oswald did not observe the rehousing, and he remained in Superintendent Mancusi's office most of Monday.

Commissioner Dunbar testified that he was on the catwalks intermittently between 11:00 a.m. and 3:00 p.m., but he did not go into the cell galleries in A block or to HBZ. Dunbar testified that he saw no reprisals during the day, other than one brief

incident. Dunbar's diary of the events does not record that incident, but he testified that he asked the Deputy Superintendent and other supervisors "to be sure to supervise those guys in the galleries in A block."

Later in the day, Dunbar repeated to the press and to legislators, whom he conducted on a brief tour, accounts of the hostages' deaths and mutilation, all of which proved untrue. He pointed out to the legislators the naked inmate lying on the table with the football under his chin as the castrater of a hostage. According to two legislators on the tour, Assemblyman Eve and Congressman Badillo, Dunbar told them the "castration" had been filmed from a helicopter, as well as observed through a rifle's telescopic sights. Around 5:00 P.M. on Monday, Dunbar guided the press around the prison and recounted to them the untrue "fact" that some hostages had been killed before the attack, in addition to repeating the "fact" that hostages died from slashed throats. After that tour, Dunbar was quoted in the *New York Times* as having given an account of the death of "Mad Bomber" Sam Melville, which was untrue in almost every detail.[7] According to Dunne, Oswald told Mancusi at 11:30 A.M. Monday morning "to be certain" of the "fact" that hostages had been killed prior to the attack before the information was released. Only the autopsies could have established with certainty the time of the hostages' deaths, but Dunbar did not wait.

Directly below Mancusi in the prison's hierarchy were Deputy Superintendent Vincent and Assistant Deputy Superintendent Pfeil. According to Mancusi they were responsible for carrying out his orders against reprisals. "Deputy Superintendent Vincent was in charge, and he and Assistant Deputy Pfeil would have supervision of this," Mancusi testified.

Vincent testified he toured the catwalks and the ground floor of A block with Commissioner Dunbar about 10:20 A.M. He saw

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[7] *New York Times*, September 14, 1971, p. 29, col. 1. For the Commission's conclusions concerning Melville's death, see pp. 397-98.

no mistreatment of inmates. "This wouldn't happen in my presence," he commented later; "I would not tolerate it." A correction officer stationed on the stairs in A block during the rehousing testified, however, that he saw Vincent at the top of the stairs on the second floor of A block about an hour after the assault ended. The correction officer recalled that Vincent yelled a warning concerning reprisals to the officers on the gallery: "He said, not to me but generally to everybody in the area. 'Let's stop' — I don't know this word for word, but it is something to the effect — 'the time has come to start treating them like human beings.' " The correction officer said Vincent's warning "slowed down the hitting quite a bit." Vincent also testified that, on Monday, he was not aware of any rumors concerning hostages killed prior to the assault. Yet Mancusi noted in his log that it was Vincent who related to him just such a rumor.

Pfeil went to A yard about 11:00 A.M. and observed the strip searching in A yard for about a half hour. During that time, Pfeil testified, he saw no physical mistreatment of inmates, although he heard some harsh language. Pfeil said he left the yard before the rehousing commenced, because he was asked to identify dead hostages lying in the maintenance building, which had been converted into a morgue. He saw one dead hostage, who had been a close friend, and he left the morgue shaken. About 1:30 P.M., he was given permission to leave the prison by Vincent, and did not return until 6:30 P.M.

Work locations assigned to corrections personnel at roll call on Friday remained unchanged on Monday, and no corrections lieutenant or sergeant was assigned to A yard or to HBZ, where alleged ringleaders were housed after the uprising. Nor did any official inspect HBZ on Monday. According to Deputy Superintendent Vincent, the one available Attica correction lieutenant was stationed in the area of the powerhouse, and two lieutenants, who had come from Auburn and Sing Sing to assist after the uprising started, were in A block.

The Sing Sing lieutenant spent about only five minutes in A yard and about an hour in A block and in A tunnel. He said

he saw only some inmates "prodded" in A tunnel, and he left the prison for the day at around noon, ill from the gas. The Auburn lieutenant testified he spent most of Monday escorting inmates to HBZ, and he saw no reprisals.

There were also ten correction sergeants at Attica on Monday. None were assigned to A yard, HBZ, A tunnel, or A block. A majority of them were interviewed by the Commission. None admitted having seen any acts of reprisal.

A National Guardsman testified in Federal court Thursday, September 16, that he had observed a correction officer dressed in a "police cap, white shirt, and blue pants" hitting inmates outside the reception building on Monday. The uniform described by the guardsman was the standard uniform of correction captains, lieutenants, and sergeants at Attica. The guardsman also testified the same officer was "perhaps the most vicious of all the guards" abusing inmates.

A number of correction officers were ordered to leave the prison or left voluntarily on Monday, but no one could say who ordered them to leave, how many left, when, or where they had been before they were relieved. A correction sergeant stationed in the chart room in the administration building on Monday later provided the Commission with a list of 22 men he said had been excused, "although there may have been others as well." Notations opposite the names purporting to indicate why they were relieved included: "broke down" (five); "emotionally unstable," "aggressive," "incapable," "irrational," "rambling," or "incoherent" (eight); "age or gas" (three); "relative of hostage," "saw bodies" (two); "heart attack" (one); "physically disabled — sent home three times" (one).

Most corrections officers who had participated in the rehousing denied that the emotional state of some officers resulted in reprisals. The documentary evidence and disinterested eyewitness testimony of the National Guardsmen is to the contrary.

By Monday morning, most officials at Attica were exhausted. Their will to prevent reprisals after the assault may have failed,

because they believed that the inmates' intransigence had prevented a peaceful resolution of the uprising and, instead, resulted in the "murder and mutilation" of hostages. But officials still represented the legal order at Attica, and their subsequent explanations only made it apparent that they had failed to meet their responsibilities. The same officials who ordered the invasion of D yard to restore law and order did nothing to prevent law enforcement officers from violating these same principles in the aftermath.

Finally, having failed in their responsibility to prevent reprisals, correction and police officials took no steps to identify and discipline those involved. Commissioner Oswald testified that he considered reprisals reprehensible, but that he had no investigative staff, and that he was hoping that any evidence of reprisals would be made available to him by the Commission and the Wyoming County grand jury upon the conclusion of their investigations. But the consequence of waiting has been to permit correction officers who engaged in acts of brutality to remain in supervision of inmates.

Monday Night

On Monday night, inmates were counted and recounted, but between four and eight were unaccounted for all night,[8] and inmates (housed mostly three to a cell in A block) were required to stand at attention at the front of their cells every half hour or so throughout the night for another count.

Many inmates testified that troopers and correction officers harassed them intermittently all night. Several inmates said they saw two people crawling around A yard Monday night and that officers were standing over them holding rifles. These statements were corrobrated by an inmate who testified he was taken from his cell to A yard . . .

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[8] The third inmate killed before the assault was not found until Tuesday morning. All the other inmates had been in cells, the prison hospital, or Meyer Memorial Hospital throughout the numerous counts.

. . . pected them to have given such explanations.[5] There were many other inmates who did cooperate, giving the Commission both eyewitness accounts of the uprising and a thorough understanding of inmate problems.

Correction Officers and Civilian Employees

The Commission's staff interviewed approximately 400 of the 450 correction officers who were on the custodial staff at Attica in September 1971, including most of the supervisory officers, the Captain, Assistant Deputy Superintendent, Deputy Superintendent and Superintendent. Less than a dozen correction officers declined to be interviewed. All but two of those who had been held hostage during the uprising were interviewed; some had not yet returned to work or had resigned and were interviewed at their homes. In addition, 25 correction officers from Auburn Correctional Facility who had come to Attica during the disturbance were interviewed at Auburn.

Correction officers were questioned about their background and training; their comparisons of Attica with other institutions; their observations about the developments in the months before September 1971; their work assignments, orders, movements, observations, and actions between September 8 and September 13, 1971; their perceptions and understandings about what took place in the inmate-controlled areas of the institution; and, finally, their present attitudes about their work and the institution.

Over 30 correction officers who were involved in significant events connected with the uprising were subpoenaed to give testimony in private session. Portions of that testimony are reflected in this report.

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[5]A number of these inmates testified about their experiences following the assault in a lawsuit brought by their attorneys to enjoin reprisals. Some also testified before a congressional committee investigating Attica and gave interviews to the media concerning conditions at Attica. All of those sources were available to the Commission.

The Commission staff also interviewed approximately 50 civilian employees of Attica Correctional Facility, including the supervisors of vocational and educational programs in the institution and all but two of the surviving civilians who had been taken hostage during the uprising.

State Police

The Commission staff had originally anticipated interviewing all 550 personnel of the New York State Division of State Police who were on the scene at Attica during the four days of the uprising. including troopers, supervisory officers, investigators, and cameramen. However, after beginning its investigation, the staff quickly determined that many of them did not have any direct knowledge of events inside the institution, nor had they taken part in the assault. Therefore, the staff concentrated its efforts on interviewing the 300 State Police personnel who participated in or had direct knowledge of these matters.

Approximately 270 State Police personnel were interviewed, including 20 commissioned officers. Interviews took place at eight different troop headquarters or zone headquarters all over the state, and at the State Police headquarters in Albany. Approximately 25 percent of those approached for interviews declined to be interviewed or refused to talk about the day of the assault.

State Police personnel were questioned about their previous law enforcement experience and their prior association with the Department of Corrections; their assignments, briefings, orders, movements, and observations on each of the days on which they were on duty at Attica; their observations of the movement, mood, and armament of inmates in D yard and elsewhere in the institution; and their opinions and critique of their commanders, their responsibilities, their actions, and the actions of other departments in connection with the assault and its aftermath.

Pursuant to an agreement by the Commission with the Patrolmen's Benevolent Association (PBA), all interviewees except commissioned officers were informed that they had the right to have a PBA delegate attend the interview with them. Almost all troopers opted to have the PBA delegate in the interview. Troopers were also told that they could have a commissioned officer or attorney present, and approximately 30 requested one of those alternatives.

Approximately 25 troopers who were involved in the assault on September 13, 1971, declined to be interviewed or refused to talk about the events of that day. A number of them, who participated in key events, were subpoenaed to testify before the Commission in executive session. In addition, approximately 24 supervisory offiecrs and other high-ranking State Police personnel testified before the Commission in executive session.

Sheriffs' Personnel

Pursuant to a mutual assistance agreement, deputies from the sheriffs' offices of nine counties were summoned to Attica on September 9, 1971. Only four of these counties sent deputies inside the walls of the institution. The remaining deputies provided outside security and traffic control. Six members of the Commission's staff interviewed over 100 sheriffs, undersheriffs, and deputies from Wyoming, Niagara, Monroe, Ontario, and Erie counties – almost all the sheriffs' personnel who were inside the walls.

Department of Correctional Services

Commissioner Russell G. Oswald and Deputy Commissioner Walter Dunbar appeared before the Commission in executive session on two separate occasions. Throughout the investigation, both of them granted numerous requests for access to department files and gave instructions to their subordinates which facilitated the Commission's investigation in many ways. In addition, Commission staff members interviewed in Albany approximately 20 employees of the department who had been at the scene at Attica in September 1971 or had been in the department office in close touch with those at the scene.

Observers, Legislators, and the Press

The Commission and its staff attempted to interview persons who were at Attica either as citizen observers or as state legislators. Twenty-four persons in this category were interviewed by the staff or the Commission in private session. Several observers could not be located for interviews. Others did not respond to attempts to contact them.

Commission staff members also interviewed several representatives of the printed and television news media who were in D yard during the four days. Because of the First Amendment problems involved, the Commission determined not to issue subpoenas to the media. Cooperation was furnished voluntarily in most instances, for which the Commission is grateful.

National Guard

National Guardsmen were interviewed in five armories in Buffalo, Niagara Falls, and Rochester during their regularly scheduled weekend drills. A seven-page questionnaire was first distributed to some 500 guardsmen, covering their training and capabilities for civil disturbance operations, the extent of their preparedness and briefings for the operation, their views of their roles in the operation, and their observations concerning the evacuation of casualties and rehousing of inmates.

Approximately 200 guardsmen, whose responses to the questionnaire indicated firsthand knowledge of material facts, were interviewed personally by the staff. The Judge Advocate of New York State was made available to advise guardsmen during many of the interview sessions. The Commanding General, John C. Baker, and his staff were interviewed personally in their offices in Albany.

Doctors, Wives, and Townspeople

Doctors and other medical personnel who were called to the scene at Attica on September 13, 1971, to treat wounded inmates, residents of the town of Attica, and wives of correction officers and inmates were also interviewed.

The Governor and His Staff

At the outset of the Commission's investigation, Governor Rockefeller and the members of his immediate staff agreed to waive executive privilege and appear before the Commission in private session. Robert R. Douglass, Secretary to the Governor, Michael Whiteman, Counsel to the Governor, Howard Shapiro, First Assistant Counsel, Dr. T. Norman Hurd, Director of State Operations, and A. C. O'Hara, Commissioner of the Office of General Services, were interviewed in a group, in their offices in Albany by the Commission's General Counsel. On April 15, 1972, they testified before the Commission.

On April 5, 1972, Governor Rockefeller met with the Commission at his New York City offices. After making a statement on the record, he answered questions from the Commission and its general counsel. The transcripts of the testimony of the Governor and his staff were subsequently released to the press and made available to the public.

Documents, Records, Tapes, and Photographs

Throughout the investigation, the Commission was sensitive to the problems created by the simultaneous prosecution of its investigation and that directed by Deputy Attorney General Fischer. At the outset, it was agreed that whatever legal power the two investigative bodies might arguably have to compel production of the interviews and work product of the other, neither would exercise that power. It was agreed, however, that all primary evidence—photographs, tapes, films, autopsy and ballistics reports, weapons and other objects found at Attica after the uprising—which were in the possession of the Fischer investigators by virtue of their earlier appointment and their use of State Police investigators, would be made available to this Commission. In all, the Commission staff amassed over two thousand documents on the correctional system, Attica, the uprising, and the assault.

The Division of State Police was the primary source of documentary and audiovisual material concerning the uprising.

The State Police took the position that in view of the grand jury investigation, nothing could be released to the Commission until approved in writing by Deputy Attorney General Fischer.

This led to protracted delays. Eventually, however, the Commission obtained photographs, slides, videotapes, and motion pictures taken from September 9 through September 13, 1971, including films of the assault, ballistics and autopsy reports, and photographs, statements, and reports made by police and correction officers of their actions and observations during the assault, samples of weapons and ammunition used during the assault, access to the collection of inmate weapons found at Attica, and other pertinent documents and materials.[*]

The Commission also obtained voluminous documents and records from the files of the Department of Correctional Services, including:

- Correspondence between the Commissioner's office and both inmates and administrators at Attica;
- The tape of a telephone "hot line" which was kept open between Attica and the department office in Albany during the uprising, and a transcript of that tape;
- Departmental press releases, reports, and bulletins;
- Commissioner Dunbar's personal diary kept during the events at Attica;
- Computer data cards on all inmates at Attica on September 9, 1971, which enabled the Commission to amass statistics on the inmate population.

The "hot-line" transcript is one of the few surviving records of the officials' contemporaneous reactions. According to Deputy

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[*] There are still some items under laboratory scrutiny, for which no report has been issued, and others upon which further tests are being made.

Commissioner Wim Van Eekeren, it was intended for the internal use of the department. Its existence was acknowledged to a Commission staff member by a department official in March 1972, four months after the Commission began its work. At key points during a conversation officials instructed Albany headquarters to turn off the tape. Commissioner Van Eekeren stated that the tape was turned off only when personal opinions were expressed, but analysis of the transcript reveals that rule was not always followed.

In addition to the documents and records obtained from Albany, the Commission had access to files kept at Attica, including all routine institutional records and logs kept during the uprising.

New York State National Guard units cooperated with the Commission by producing pertinent records of their operations at Attica and other materials relating to military assistance to civil authorities in civil disturbances.

Professional Consultants and Special Projects

The autopsies of inmates and hostages who died at Attica were conducted by some of the country's most eminent pathologists, including Dr. John Edland, Monroe County Medical Examiner, and Dr. Michael Baden, Assistant Medical Examiner of New York County. Nevertheless, the Commission considered that its mandate required it to engage its own pathologist. Dr. Alan Moritz, Profes-. . .

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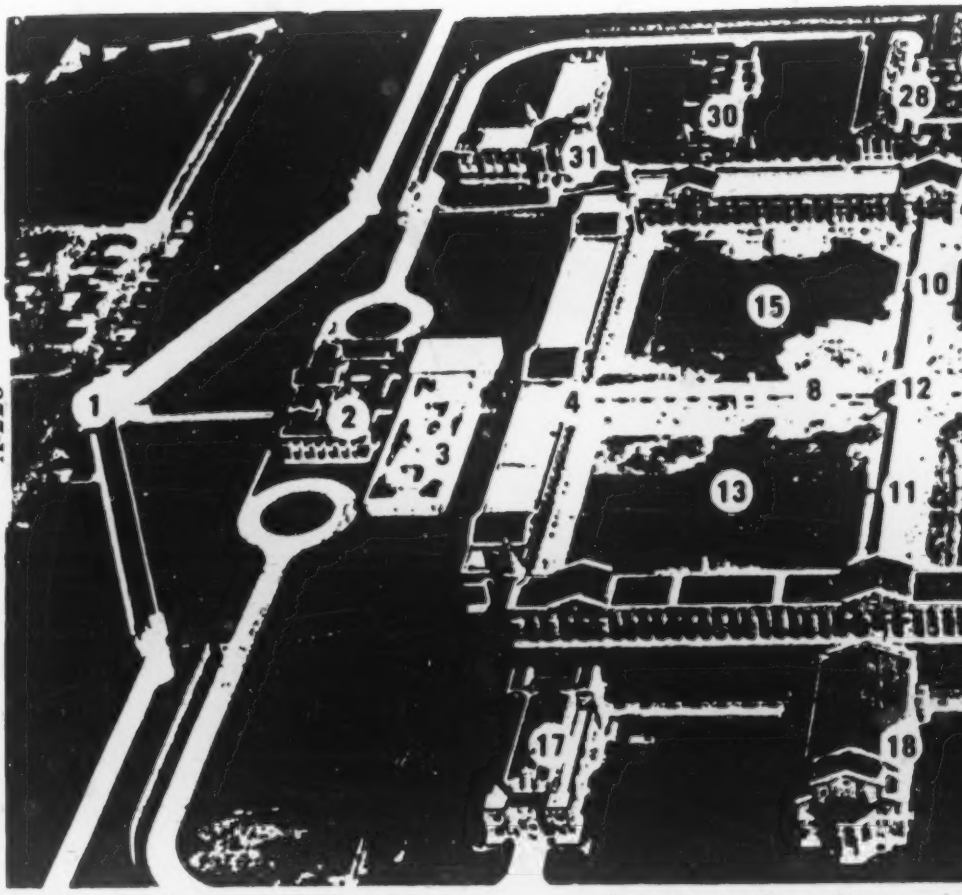
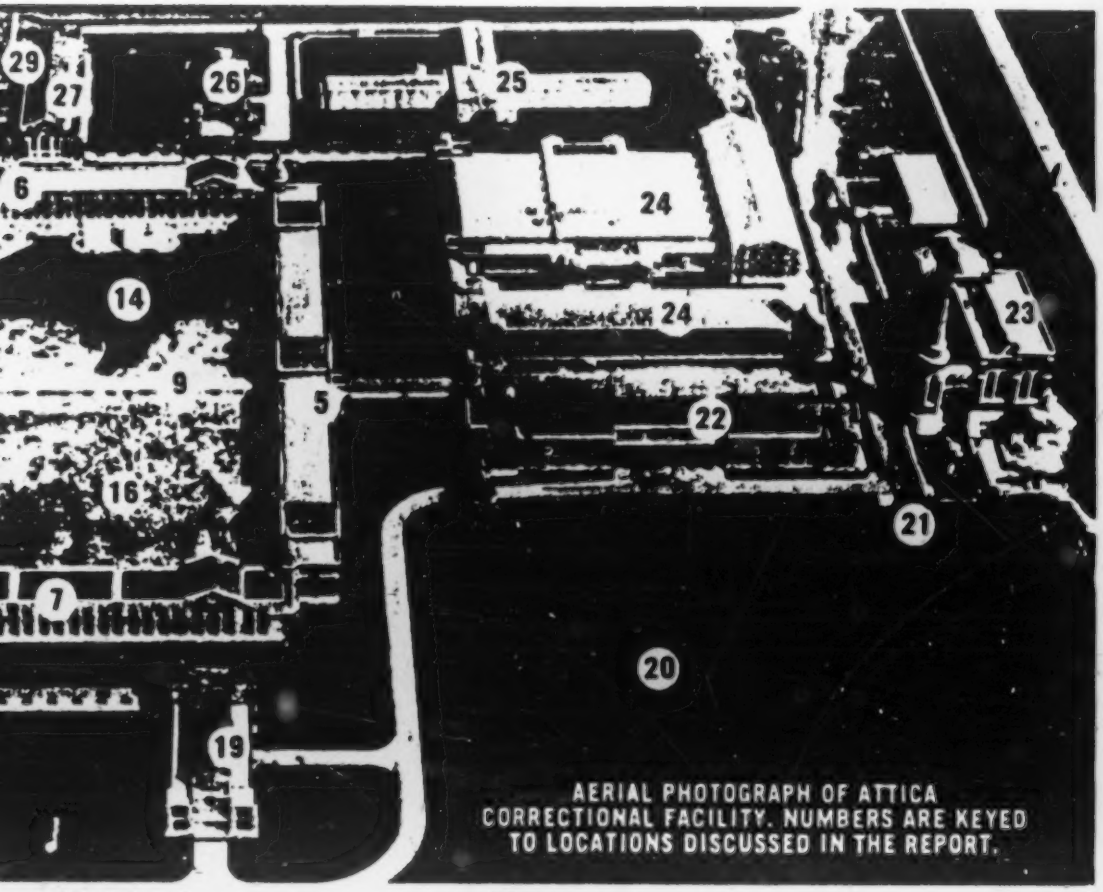
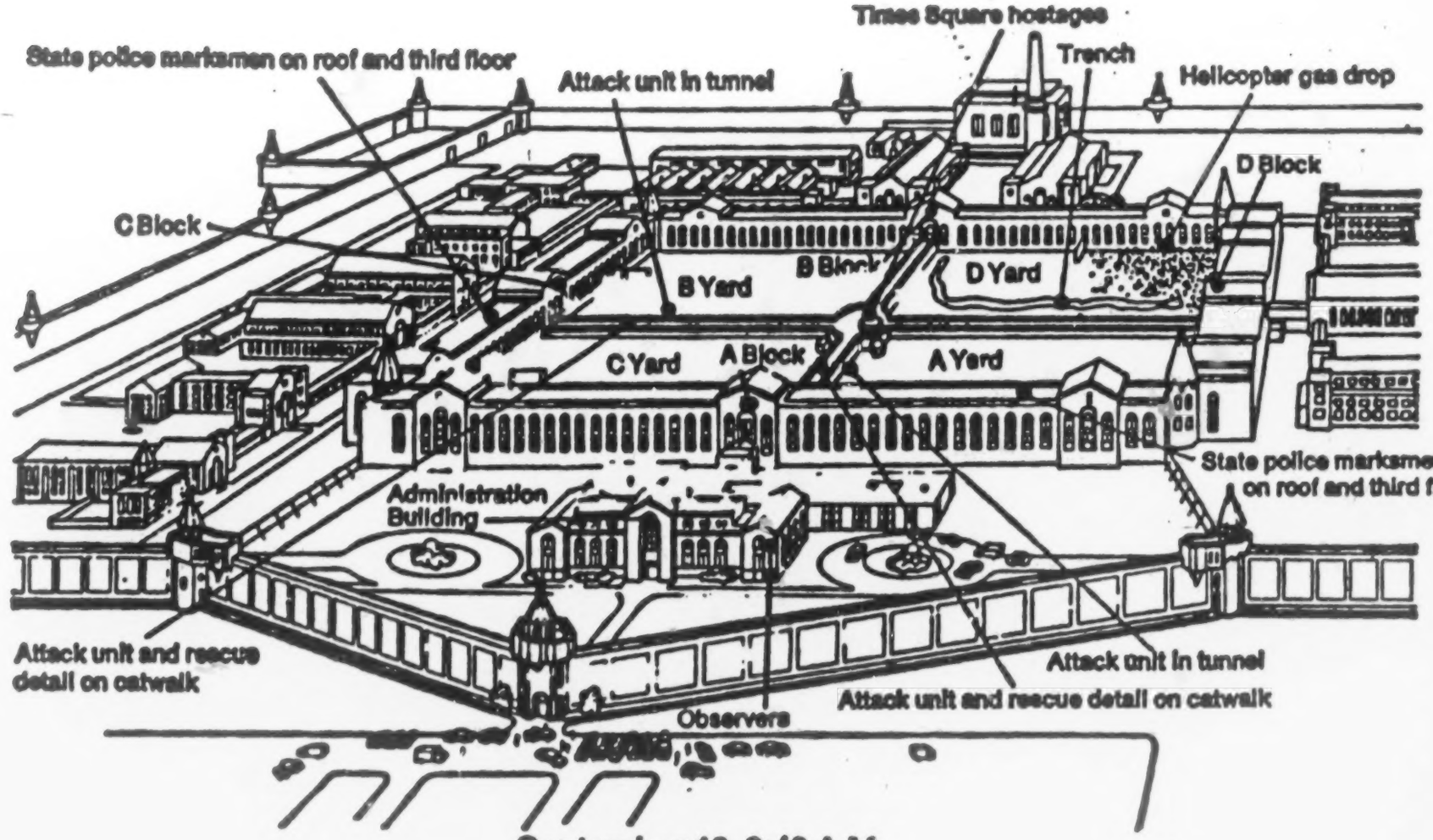


1 Front Gate
2 Administration Bldg.
3 Annex
4 A Block
5 B Block
6 C Block
7 D Block
8 A Catwalk and Tunnel
9 B Catwalk and Tunnel
10 C Catwalk and Tunnel
11 D Catwalk and Tunnel
12 Times Square
13 A Yard
14 B Yard
15 C Yard
16 D Yard



AERIAL PHOTOGRAPH OF ATTICA CORRECTIONAL FACILITY. NUMBERS ARE KEYED TO LOCATIONS DISCUSSED IN THE REPORT.

17 School
18 Auditorium/Chapel
19 State Shop
20 Ponderosa
21 Coal Shack
22 Commissary/Garage
23 Powerhouse
24 Metal Shops
25 E Block
26 Laundry
27 B Mess
28 A Mess
29 Kitchen/Bake Shop
30 Hospital
31 Reception Center and Segregation Cells (HBZ)



September 13, 9:46 A.M.

JUDGE CURTIN'S DECISION 10/6/71

. . . middle, namely, from trying to do what is inherently impossible, prosecute both the inmates and the State Troopers and the correction officers. We simply say one or the other, he can't do both. Obviously, he will stick to prosecuting the inmates. Therefore, we would ask that he not make any pretentions or prosecute anything else and not be permitted to. That is about all I think we have, your Honor. With respect to Mr. Eve, Mr. Ricotta was here yesterday and cross examined.

MR. RICHMAN: Just one thing briefly, your Honor. Mr. Schwartz's comments are totally - - -

THE COURT: Mr. Richman, please.

MR. RICHMAN: No, I just have one thing to say. We are not here to prosecute only inmates, your Honor. We are here to prosecute those crimes that come to our attention and I- -

THE COURT: Mr. Richman, you have made this argument here again and again. It doesn't help to make it again. Very well. First of all, I want to, and all through this proceeding we have had the need for immediate attention of attorneys for the plaintiffs and also the defendants and I want to thank both sides for their cooperation with the Court and I certainly, as far as the attendance of witnesses, the conduct of the proceedings, the cooperation of the Marshals and everyone that is concerned with this very difficult problem, they have all been most cooperative.

Then too, in this situation the Court has had the need from time to time to issue orders, quick orders. It was done because of the need for either instant relief or at least the opportunity to be heard, and again I want to thank the attorneys on both sides for the cooperation with the Court and getting information to the Court just as quickly as possible.

It seemed to me to be important in this litigation to make a decision as soon as reasonably possible, make it one which would try to the best of my ability to cover the problems before

us and let the parties know, as far as I am concerned, this Court is concerned, so that if either side wanted to make appropriate application for appellate relief they could do so immediately. That is the reason why I have asked you to come here today so that I could make my decision from the bench rather than have it typed in a more formal fashion and filed, which you find usually takes a little more time.

As we all know, this action was brought under the Civil Rights Act. The Court has filed an order dated September 28, 1971, denying plaintiffs' application in part. The Court must still decide whether a preliminary order should be granted enjoining the destruction of legal material belonging to inmates of the Attica Correctional Facility; enjoining the abuse of inmates at the Attica institution; three, enjoining Assistant Attorney General Robert Fischer's investigation of the events at Attica; four, appointing Federal monitors at the Attica institution, and five, permitting plaintiffs to maintain this action as a class action.

Also pending is defendants' motion to dismiss the complaint.

The Civil Rights Act, passed by Congress shortly after the Civil War, provides a means of redress to any person deprived by state officials of a right guaranteed him by the United States Constitution. That person may bring an action in federal court for prospective relief or for monetary damages. See Monroe against Pape, 365 U.S. 167, decided in 1961. The remedies of the Civil Rights Act are available to persons incarcerated in state prisons. That would be the applicants in this case. See Cooper against Pate, 378 U.S. 546, decided in 1964. The jurisdiction of a federal court is limited, as stated above, by the requirement of the Act that the actions complained of amount to a deprivation of constitution rights, and in order for a court to grant injunctive and prospective relief as is sought here, there must be a continuing unconstitutional deprivation or a threat of such continuation. Therefore, it is the task of this court to determine from the testimony presented to it whether there is presently a continuation of threat of continuation of unconstitutional action by state officials at the Attica Correctional Facility.

Since the order of September 28, the court has had an opportunity to listen to the testimony of prisoner witnesses, of Vincent Mancusi, Superintendent of Attica, of Clarence Jones, a member of the Goldman panel and of Assemblyman Arthur Eve, a member of the observer committee during the events of September 9th to 13th.

The testimony is now closed and the court will now rule on the various motions pending before it.

The proceedings before this court arose from the tragic prisoner uprising at Attica Correctional Facility beginning on September 9th and continuing to the morning of September 13, 1971. On the morning of the 13th, state troopers and correctional officers regained control at a cost of 10 guards and 32 prisoners dead and many guards and prisoners injured. The questions before this court do not concern the riot itself or its suppression, but rather the treatment of prisoners beginning on the morning of the 13th. Also concerned is the investigation by state authorities into all the events connected with the problem. A brief summary of the various applications made to the court and the hearings held may help to explain the court's decision.

On the evening of September 13th, counsel for the inmates requested the court to issue a temporary restraining order directing prison officials to permit entry into Attica of attorneys and additional medical personnel and directing that no inmate be interrogated except in the presence of counsel and after he had been counselled by an attorney. The show cause order was made returnable the following morning, September 14th. The court reasoned at that time that this somewhat unusual order should be granted with an immediate return to the court because it was evident that the situation at Attica was tense and that because of the uprising

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as a class action. Defendants' counsel also described the form which was being distributed to inmates describing their right to counsel. At that time the proceedings were adjourned until September 30th to hear testimony from plaintiffs' witnesses.

On September 28th, the court filed an interim order dismissing some of plaintiffs' claims for relief. The court felt that it

was important to make the order at that time in order to guide the attorneys in the questioning of witnesses at the hearing on September 30th.

The plaintiffs filed an immediate appeal from this order.

On September 30th and October 4th, the court heard testimony from six inmates of the Attica Correctional Facility; Frank Lott, Roger Champen, Herbert Blyden, William Jackson, Charles Colvin and Gary Haynes.

Several of the inmates testified that they had been beaten by correctional officers and state troopers on September 13th following the assault on the prison by state authorities. Some stated that they had run a gauntlet of correctional officers similar to the one described by the National Guardsman, Mr. Watson.

William Jackson, a prisoner not involved in the events of September 9th to 13th, testified that while he was working on a cleanup detail on September 14th he had seen inmates being pushed past him and hit by correctional officers with billy clubs. One of the inmates was bloody and an officer referring to him by a racial epithet said that he had fallen down a flight of stairs.

Some of the prisoners testified that in the days following the restoration of official control of the Attica facility they had been verbally abused and threatened with death, particularly by correctional officers on the night shift. It was stated that on one occasion about a dozen officers led by Deputy Superintendent went from cell to cell in HBZ or Housing Block Z hitting the bars of the cells with clubs, referring to the occupants by offensive racial terms and threatening that they would be killed. On other occasions correctional officers allegedly stuck guns through the bars or held guns to inmates' heads.

One prisoner, Charles Colvin, testified that during one such episode he was told to sign his name to several papers or he would be killed. He said that although he was not informed of the papers' contents he did as he had been instructed.

Several inmates stated that their personal property and legal papers had been confiscated and destroyed by prison officials.

William Jackson said that he saw inmates' personal belongings and legal books, materials and papers packed into barrels and loaded onto dump trucks.

Superintendent Mancusi later explained that debris from within the prison was hauled away to a landfill site but that instructions were given to safeguard personal property as well as possible. Whether or not this was carried out on all occasions he could not tell.

Gary Haynes testified that he has a terminal kidney condition requiring daily medication. He stated he was unable to receive his medicine during the prisoners' uprising; that when official control was restored he began to urinate blood and that doctors refused to give him any medicine either in his cell or at the prison hospital until September 30th.

On cross examination all inmates testified that they had consulted with attorneys on at least two and on some occasions on a number of occasions since the 13th and that they had seen various public officials who were observing conditions in their cellblocks.

On September 30th and October 4th, the court has heard testimony from Mr. Mancusi. He stated in response to questions by plaintiffs' counsel that there were then about 1230 inmates in Attica, housed one man to a cell. Two out of the four cellblocks remainend unusable. Mr. Mancusi said that those men who were suspected to have fomented the riot or actively participated in it had been put in HBZ or in A Block 1 and 6 Companies. The facilities, food and treatment accorded inmates in these areas were the same as in the rest of the prison except that security was tighter and the opportunity to exercise more restricted. Mr. Mancusi said that if an inmate complained that he was being wrongfully held in HBZ he would check with Mr. Fischer and would look into his complaint and remedy the situation if the complaint were well taken.

From the testimony of Mr. Mancusi and others the court concludes that the described confinement of certain prisoners in HBZ and A Block under the circumstances described here is not cruel and unusual punishment. Sostre against McGinnis 442 F.2d 178, decided Second Circuit 1971.

Whatever practical or personal views this court has about the problems facing the authorities at Attica or the problems facing the inmates, the members of the Fischer staff, the Goldman panel, the legislators of the state, the commission appointed by the Governor to examine and report on Attica, this court's concern can only be are the constitutional rights of the plaintiffs being violated and will a preliminary order of this court at this time effectively protect their rights.

For the purpose of this application the truth of the witnesses' testimony is assumed. If the events described did occur there is no question that these events, the beatings, the running of the gauntlet, the racial slurs, the night time harassment, the threats of future injury and reprisal and the destruction of watches, eye glasses, legal materials, books and other property should not have occurred and should not be permitted to occur in the future. No doubt, many of these events and similar occurrences may be the subject of future individual complaints, but the question before the court is whether an injunction should issue restraining similar acts or whether an order should issue appointing federal monitors to observe and perhaps supervise the work of the Superintendent.

Before reaching a decision on this question it should be observed that almost all of the alleged acts complained of occurred on September 13th or shortly thereafter. The court at this time makes no judgment about the quality or effectiveness of the supervision during that period or whether Mr. Mancusi and others in charge of the facility should have known about these activities. There is no evidence, however, before the court that Mr. Mancusi or other in superivision countenanced or knew about any improper behaviors. The one event in which a supervisor is alleged to have harassed an inmate is contested by evidence presented by the defense. Furthermore, a number of

steps are underway by the authorities to make sure that adequate safeguards are made for inmates' rights. The Goldman panel has visited the facility talked to the inmates and recommended that monitors be appointed. Mr. Dunbar told us that the correction service would think about the recommendation for monitors and we have been informed by Mr. Fischer today that the Governor has now taken up that recommendation and has written to the United States Department of Justice in regard to it.

Regarding the form, the court makes no judgment upon the validity of the form and what effect its use will have in a particular case but only notes that it is a step taken by the state to call an inmate's attention to his rights.

It appears that some legal material and other property were destroyed on September 13th or immediately thereafter. Some of this may be explained by the pressure for an immediate cleanup. Although some articles were perhaps destroyed wilfully, there is no evidence that this has continued to the present. Mr. Mancusi has directed that the private property of all inmates be safeguarded and has explained the steps being taken to bag and redistribute the belongings of the prisoners.

Regarding the complaint of physical abuse, there is no evidence, again, that this has continued after the 14th of September. There is evidence that racial slurs, night time harassment, threats and other improper conduct have continued. These are serious matters and require the attention of the correctional authorities to make sure that they do not continue. There is no reason to believe that these steps can not effectively be taken by state authorities and the plaintiffs have failed to persuade the court that there is any need for federal injunctive relief in this regard.

As the foregoing summary indicates the evidence before the court is that any actions of state officials arguably amounting to unconstitutional conduct occurred shortly after they regained control of Attica Correctional Facility on September 13, 1971. There is no evidence that such abuses are continuing at the present.

First, the preliminary relief sought by the plaintiffs is denied. No purpose would be served by permitting the complaint to stand as a class action.

Therefore, the defendants' motion to dismiss is granted. Nothing has been brought to the attention of this court since its order of September 28th, which would require modification of that particular order.

This order of the court certainly does not preclude individual inmates from seeking relief in this or any other court for deprivation of their either constitutional or their state rights as they may see fit to file a complaint, and that being the order of the court, is there anything further?

Otherwise, we will be in recess. Mr. Schwartz? We will be in recess.

(Whereupon the proceedings herein were concluded.)

I hereby certify that this record is a true and accurate transcript from my stenographic notes in this proceeding.

/s/

Official Reporter
U.S. District Court

UNITED STATES DISTRICT COURT:
WESTERN DISTRICT OF NEW YORK

INMATES OF THE ATTICA CORRECTIONAL FACILITY, MARIANO GONZALES, PETER BUTLER, on behalf of themselves and all other persons similarly situated,

Plaintiffs

-vs-

NELSON ROCKEFELLER, Governor, State of New York
RUSSELL G. OSWALD, Commissioner of Corrections of the State of New York;
VINCENT MANCUSI, Superintendent, Attica Correctional Facility,

Defendants.

CIVIL ACTION No. 1971-410

Proceedings of September 30, 1971, held before the Hon. John T. Curtin, United States District Judge, at the United States Court House, Buffalo, New York.

APPEARANCES: HERMAN SCHWARTZ, Esq.; WILLIAM HELLERSTEIN, Esq.; B. DAN PACHODA, Esq.; RICHARD LIPPES, Esq.; MRS. BARBARA SHAPIRO; JAMES RIEF, Esq.; Attorneys for the Plaintiffs.

LOUIS J. LEFKOWITZ, Attorney General of the State of New York, Attorney for the Defendants; ROBERT FISCHER, Esq.; MAXWELL SPOONT, Esq.; DAVID RICHMAN, Esq.; JOSEPH RICOTTA, Esq., of Counsel.

INDEX OF WITNESSES

	DR.	CR.	RDR.	RCR.
VINCENT R. MANCUSI	11			
FRANK LOTT	44	65		
ROGER CHAMPEN	94	108	124	
HERBERT BLYDEN	128	150	159	

PROCEEDINGS: September 30, 1971, 2:10 P.M.

APPEARANCES: As before noted.

THE COURT: All right, all present. It would help quite a bit here today if we could have only one attorney do the questioning on both sides. It doesn't matter who begins, but if you begin, Mr. Schwartz, with a witness, I think you should end with a witness.

MR. FISCHER: May I be heard in that regard, your Honor?

THE COURT: Yes.

MR. FISCHER: In the light of your Honor's decision, there appears to remain three issues before the Court and I think it is in the concluding paragraph of your Honor's decision. There remains, namely, the question of destruction of legal papers of inmates; the question of whether or not there has been destruction and has been denied them thereby access to the courts, issue one.

Issue two, the question of whether inmates may be permitted to maintain this action as a class action.

Issue three, that they, the inmates, have been subjected to physical abuse amounting to a denial of their rights under the Eighth Amendment. Now, I would like to indicate to your Honor, initially, that my jurisdiction is criminal only. I do not have any right in a civil action other than perhaps having been named as a party in the caption.

THE COURT: Mr. Fischer, why don't we get to these things as they come up.

MR. FISCHER: The problem occurs, your Honor, as to who has the right of cross examination.

THE COURT: Please, we will take these things up when they come. You have Mr. Spoont here and Mr. Richman here and Mr. Ricotta, and they have been here before.

MR. FISCHER: I understand.

THE COURT: If there is any problem about questioning and you feel there should be some exceptions made as to some witnesses, let me know and we will take care of it all right.

* * *

Q Yes.

A I have, on a number of occasions transmitted orders to all supervisors that it is their responsibility to see that the officers under their command are able to exercise self-discipline and are able to be emotionally stable and if they recognize an individual that is not, I want him out of the facility.

Q Have you given any special orders to correction officers with respect to the post-disturbance situation?

A Through the deputy, we have instructed officers that we expect courteous, respectful relationships and treatment from the inmates and to the inmates.

Q Was that order a memorandum?

A That order was placed in a number of rules and regulations and it was published to all officers.

Q Do you recall the date?

A No, sir, I don't.

Q I believe you have just stated that you gave several orders about emotionally disturbed persons?

A Yes, sir. I recall the date that this order was first given. This order was first given immediately after the assault on the 13th.

Q Is there any particular reason why you gave more than one order concerning the disturbance?

A Because I wanted to make sure that there was no officer who had been in an emotional state which would result in mistreatment or mishandling of any inmates.

Q Did any specific instance come to your attention about such emotional disturbance of a particular officer?

A A number of officers were relieved of duty because of their emotional situation.

Q Do you recall from what period of time to what period of time?

A No, sir, I do not.

Q Any idea how many?

A I know that eight were sent home.

Q Would you recall the names of those eight?

A I don't have the names and it would be embarrassing to these people and I would prefer not to give these names.

Q Would you tell the Court, if you can, what steps were taken directly to ease the tension that existed between the inmates and the correctional staff?

A Monitors were sent throughout the institution. A correction sergeant and departmental members who were not previously stationed at the institution were sent throughout the institution to observe and counsel and to cool. In addition to this, members of the Goldman Committee have been in the institution since its inception and have been auditing and observing.

Q When did you first have monitors into the institution?

* * *

... investigation, any information that they might have or might receive should be channeled to the deputy superintendent or superintendent's office for transfer to Judge Fischer for evaluation and use.

BY MR. HELLERSTEIN:

Q One question before, - before you mentioned that eight guards had been relieved of their duties because of emotional disturbance. What incidents did that action arise out of? Why were they relieved?

A Because this was an evaluation of the supervisor for whom they were working that they could not function because of their emotional state; that they could not function in accordance with rules and regulations.

Q What specific incident triggered that determination?

A This determination would not require a specific instance. This would be an evaluation made by a supervisor from personal appearance; from possible talk with the person he was working for.

Q Do you know whether that evaluation was made without a specific incident being the cause?

A I would say in some instances that evaluation was made without a specific instance.

Q And in other instances, do you know what those were?

A No, I don't.

HEARING 9/30/71
INMATE LOTT

* * *

THE WITNESS: Yes, sir.

THE COURT: Thank you.

THE WITNESS: Immediately after the take-over, we were ordered to strip stark naked and our property was taken from us and we were herded into another area of the institution and made to lay down in the grass naked.

BY MR. PACHODA:

Q Do you recall who gave this order, Mr. Lott?

A The officer that was in charge, the State Police. They had us to lay down in the grass until they was ready to house us in another area of the institution.

Q And what happened then?

A Right after that, then they herded us all into the cellblock and were required to run in the middle, run the gauntlet, I think it was, with officers on both sides of us and we were hit with sticks and belts and everything else going to our cells and they put three of us prisoners in a cell. They sprayed water on us with a hose from the firetruck.

Q Do you recall where, what area this was you were herded into before you had to run the gauntlet, as you say?

A Yes. This was right outside the A block, A block, right outside the door. We were all herded there and then we were herded into the A block section.

Q You were outside in the yard?

A We was outside in the yard, yes, sir.

Q And at that point, a line formed, is that right?

A Yes. Two lines were formed by the officers, correction officers, along with State Troopers and they started beating us and we just run through the line, each one of us with the water on the floor from the hose and we run through the middle of the officers and they hit us with sticks and everything else there and they put three of us in the cells naked.

Q And how long did it take you to go through this line, you recall?

A Through the line?

Q Yes.

A I was running pretty fast because they was hitting me. I was running pretty fast. I would say maybe about ten or twenty seconds to the cell that I had to run to.

Q And you saw other prisoners as well that were forced to run through —

A Oh, yes. There was guys in front of me and I mean some were along after me.

Q Did they pick out any special people to run through this line?

A No. Everybody there was required to strip, everybody in that line. They run everybody through that line, everybody.

Q And did you recognize any of the officers that hit you?

A No, sir. I don't know too many of those guys. I only been there a year and I don't know who the officers were. I don't know their names.

Q I mean, you have seen them before?

A Oh, yes, sir, I have, yes.

Q They were officers at Attica?

A Officers at Attica Prison, yes.

Q And are some of them still at Attica?

A Yes, sir, yes, sir.

Q Prior to this, had you, and after you had been taken into custody and after the shooting stopped, did you see a Mr. Barkley, called "LD" alive?

A Yes, I seen "LD" after we, — after they stripped me and the rest of the fellows. He was alive. He was stipped too.

Q Can you describe just where you were when you saw this?

A I was right in A block area there and we all was laying down with our noses in the ground there and some guys was getting undressed because all of them hadn't got undressed as yet, and I see him right there behind me.

Q And you knew Mr. Barkley?

A "LD" is well-known around the institution, yes.

Q Now, did you recognize or would you know if any of the guards you noticed in this gauntlet, are they still guarding you in the area that you are now housed?

A Well, they are not, no, not the ones that was beating on us, no, they are not there.

Q Did you suffer any injuries at this time?

A Oh, yes, sir. I was dragged. My hands was tied behind my back and my feet was grabbed up above and I was dragged and I was skinned all on the side of me.

Q And did you notice other prisoners suffering injuries?

A Oh, yes. Some were marked with chalk on the back of their, — you know, the back of their bodies. They were marked with chalk and they were beaten up also.

Q Did you notice who did these markings?

A The officers, the New York State Correction Officers.

Q What type of marking was it?

A A chalk mark "X", an "X" on their back.

Q And this was prior to running through the gauntlet?

A Yes, this was prior to coming up the stairs, they were beating us and we come up the stairs and they were beating and pointing at the marking with the chalk and we had to run through.

Q Do you remember any of the names of the prisoners who were marked?

A Well, I know for a fact that Champ was marked, a guy named Champ, Roger Champen was marked, and a few other guys I don't know their names that were marked with chalk on their back.

Q All right. And these persons who were marked were beat especially heavy, is that what you are saying?

A Yes, sir.

Q And where were you placed then, what cell was this?

A First I was placed in Cell Number 702. I don't remember what company, but I was placed in Cell Number 2 with two other fellows.

Q Which block?

A A block.

Q In A block?

A Yes, sir, A block.

Q And then would you describe what happened to you then?

A Well, right after that, they came in there and they told me, an officer along with two State Troopers, the Correction Officer told me that he had my picture there on a card of some sort and he said they had orders to remove me and then after they took me down to Number 19 cell.

THE COURT: Excuse me, Mr. Lott –

THE WITNESS: Yes, sir.

THE COURT: Is this the same day, the 13th?

THE WITNESS: Yes, [illegible] Yes, sir. They said that he had orders to remove me so they moved me down to 19 cell and about half an hour later, they came and told me that they had orders to move me again and I asked them "why" and they said "well, we are getting rid of you", just like that. And then they went and took me down to D block area, so I heard an officer say "all we got to do is throw some dirt over him", and they took me in the yard there with the guns. Two state troopers and correction officers with helmets, and they put a gun at my head and just about that time, a correction officer came from the hallway and hollered "bring him back, bring him back in", so they took me back and put me in 19 cell and right after that they took me up to segregation in the institution.

BY MR. PACHODA:

Q Did the trooper say anything to you when he had the gun to your head?

A No. The correction officer said "what's the matter, you not going to pray", and I didn't say anything. He said "what's the matter, you not going to pray", and I didn't say nothing.

Q Did the correction officer who came running out say anything?

A He didn't come running out. He spoke through the broken glass in the side of the hallway. He told them to bring me back and they brought me back from the ditch.

Q Where were you placed then?

A Then I was placed in segregation on the roof there. I was in Housing Block Z.

Q Is that also called HBZ?

A HBZ, yes, sir.

Q And you have been located there since that time?

A Yes, sir.

Q Would you generally describe the conditions of your confinement in segregation or HBZ as they exist today?

A Yes. I would start off by saying the conditions as they exist in HBZ are inhuman. We are constantly being harassed, mostly by the 8 P.M. to 8 A.M. correction officers with threats of death. This happened every night. You live at night in fear that this doesn't happen and not myself, but they stuck a gun in another guy down the way, cell Number 5, they stuck a gun in his ceil, Assistant Deputy Warden, Carl Pfiel, came up one night

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HEARING 9/30/71
INMATE CHARLES COLVIN

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MR. RICHMAN: Excuse me, Judge. Would you ask the witness to speak up.

MR. O'CONNOR: Speak a little louder.

THE COURT: It is hard to hear in this room. Just take your time and speak up. You don't have to speak right into that because otherwise it really blasts. Just speak up and take your time.

BY MR. O'CONNOR:

Q. The question I put to you, sir, what sentence?

A. Three to ten years.

THE COURT: You can move back a little bit, Mr. Colvin. All right.

BY MR. O'CONNOR:

Q. Presently what is the cell and block number that you are confined to?

A. A Block, 6 Company, 26 Cell.

Q. Mr. Colvin, I take you back to the date of September 13, 1971. Were you in the vicinity known as D Yard on that date?

A. Yes sir.

Q. And did there come a time that you were taken from that location to A Yard?

A. Yes sir.

Q. And that was at Attica State's Prison, is that correct?

A. Yes sir.

Q. Could you tell the Court what occurred to you at that date and time, please?

A. I was taken from D Block into A Yard. I was told to get down on the ground, put my face into the ground and crawl.

Q. At that time can you tell the Court how you were dressed?

A. I was fully dressed.

Q. Continue sir.

A. I crawled about six or seven yards and then I was approached by a correction officer.

Q. You were crawling on the ground?

A. Yes sir.

Q. Can you describe to the Court how you were crawling?

A. I was on my belly, my face and my knees.

Q. And how were you moving yourself along the ground, sir?

A. On my elbows, knees.

Q. You may continue.

A. So as I was crawling four correction officers and a state trooper approached me and the correction officer said "Wherever bashee" and he said "Stand up", and I stood up and he told me to strip and as I stripped –

Q. By "strip" what do you mean?

A. Take off all my clothes. After I stripped he took my watch from my wrist and he broke it and then the correction officer said "Well, you going to die now, you going to die".

Q. Will you please speak a little slower and clearer, please. What did he say?

A. The correction officer said "You going to die, nigger, you going to die", and they begin to hit me with the sticks and so on.

Q. When you say they began to hit you with the sticks, who began to hit you with the sticks?

A. The correction officer.

Q. They struck you on your body?

A. Yes sir.

Q. You may continue.

A. And he told me to go over there, put my head against the wall.

Q. He directed you to go someplace?

A. Yes sir.

Q. Where, if you can recall, were you directed to go?

A. Against the wall in A Yard.

Q. Did you go to that location?

A. Yes sir.

Q. Did something take place at that location?

A. Yes sir. I was told to put my head against the wall and put my hands on my, — I'm not sure what it was, — put my hand on my eyes.

Q. Who directed you to do this?

A. Correction officer.

Q. And did you assume that position?

A. Yes sir.

Q. How long were you in that position?

A. A long period of time.

Q. At that time could you see what was going on in the yard around you?

A. We was told not to look around the yard or our head would be blown off.

Q. Did you have occasion to see anything at that time?

A. No sir.

Q. Now, did there come a time that you were removed from that location?

A. Yes sir.

Q. Will you tell the Court what took place then?

A. Well, I was moved from that spot and I had to put my hands against the wall this time and stand there longer than I did before. And then a state trooper came by, I believe with some kind of chalk or something and marked something on my back.

Q. And at that time were you still against the wall?

A. Yes sir.

Q. Did there come a time that you were removed from that location?

A. Yes sir.

Q. Were you taken someplace?

A. I was taken off the wall into A Block.

Q. And when you got to A Block, was that A Block –

A. Door.

Q. Building?

A. A Block door, yes sir.

Q. Did you see or observe anything at that time?

A. Yes sir. I saw three or four inmates being beaten by officers and state troopers.

Q. You say being beaten. How were they being beaten?

A. Sticks, straps and so on.

Q. Were these inmates sitting or lying?

A. They was running.

Q. Running where?

A. Through the line, through the gauntlet lines.

Q. And where were these lines at?

A. In the corridor.

Q. In the corridor of where, sir?

A. A Block corridor.

Q. And you said they had lines?

A. Yes sir.

Q. Describe to the Court in your own words what these lines were like, what you observed at that time.

A. Well, there was two sides to the line, correction officers

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HEARING 9/30/71
VINCENT MANCUSI

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THE WITNESS: Yes, sir, I would.

BY MR. HELLERSTEIN:

Q. Are you aware of the fact, Mr. Mancusi, that on certain, on September 13th, certain inmates were marked with a piece of chalk in an "X" fashion by members of your correctional staff and state troopers? Do you have any information on that?

A. I have become aware that this was done for purposes of identification.

Q. Who authorized that that be done?

A. I don't know, sir.

Q. Did it come as a surprise to you when you learned that it had been done?

MR. RICHMAN: I am going to object to that, Judge. The fact that it was done, it was done.

THE COURT: "Were you surprised". No, I will permit that.

THE WITNESS: I checked to find out if it had been done.

BY MR. HELLERSTEIN:

Q. And what did you find out?

A. It had.

Q. On how many people?

A. I don't know.

Q. By whom?

A. I have been informed that it was a state police procedure.

Q. Have you been informed as to the basis upon which that procedure was implemented?

A. From information I have received, it was for the purpose of identifying people who were involved as active participants.

Q. When did the state troopers enter the premises?

A. Sir?

Q. When did the state troopers enter the premises?

A. On 9-13 at the assault.

Q. If they were the agency that to itself decided to designate the people who were involved.

A. The state police were in charge of the assault.

Q. Had this procedure with respect to marking "X's" on people's backs been checked with you?

A. No, sir.

Q. Had you ever heard of it prior to the time it was implemented?

A. Had I heard of it prior to that?

Q. Yes, sir.

A. No, sir.

Q. Do you know what official of the state troopers gave that order? Was it Mr. Williams?

A. No, sir. I don't know.

Q. When did you learn about this "X" procedure?

A. Some days later.

Q. Do you recall who brought it to your attention?

A. I first heard it, I believe, in connection with a Thomas Hicks.

Q. Do you recall who told you that?

A. No, sir, I don't.

Q. Did you make any personal attempt to observe which people had been marked with an "X"?

A. No, sir, I did not.

Q. Did you express your opinion to anyone as to the propriety of that procedure?

A. My opinion was not requested.

Q. Is it your testimony that no correction officer did the marking, that it was only state troopers?

A. No, sir, it is not.

Q. Correction officers did?

A. I don't know.

Q. You don't know?

A. I have no knowledge.

Q. Would your personnel do that without an order from you?

A. Some members of the correctional staff were assigned to state police groups on the day of the assault and they could very well have been asked to do that and they would have done this.

Q. You mentioned Thomas Hicks. Had he been marked with an "X"?

A. I don't know. That is the first name that I heard mentioned.

Q. Well, how did you hear it mentioned, that he was marked or was not marked?

A. It came at a pastime conversation that some lawyer or some attorney had said that outside the front gate of the prison.

Q. So your knowledge about Hicks is what you heard some lawyer say outside of the prison?

A. You asked me how I heard and I just –

Q. Do you know whether the marking took place after the prison was secured on the 13th?

A. No, sir, I don't.

Q. Do you know what happened to those people who were marked?

A. I have an assumption, but I don't know.

Q. Would you care to tell the Court your assumption?

A. I assume that they were routed to HBZ or 1 or 6 Company.

Q. So state troopers who were not on the premises before the 13th did the markings which then you assume resulted in at least some of the HB population being placed there.

A. State troopers were on the premises from the 9th throughout the course of the riot.

Q. Mr. Mancusi, the other day when we finished before the

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HEARING 10/4/71
INMATE HAYNES

* * *

A. Yes sir.

Q. And will you tell the Court how you got there?

A. Yes sir. I was told by a state trooper to go to A Block Yard, and which I did.

THE COURT: Excuse me, Mr. Haynes. Were you in D Yard before?

THE WITNESS: Yes sir.

THE COURT: Were you in the D Block vicinity from roughly around the 9th to the 13th?

MR. O'CONNOR: Your Honor, counsel at this time, in view of the stipulations made to the Court, would respectfully ask the Court –

THE COURT: I think it is important to know were you in a cell from the period of a few days before the 13th?

THE WITNESS: Was I in a cell?

THE COURT: Were you in a cell or were you out in the D Block Yard area?

THE WITNESS: Yes, I was in the D Block Yard.

THE COURT: Yard?

THE WITNESS: I was in the yard at all times.

THE COURT: All right, fine. Go ahead, Mr. O'Connor.

BY MR. O'CONNOR:

Q. Now, would you tell the Court what took place at that time and at that date to the best of your recollection?

A. I woke up early in the morning –

Q. No, no.

A. No?

Q. The time you were in A Block Yard?

A. Oh, from the time I was in –

Q. A Block Yard.

A. A Block Yard. As soon as I got to the yard, a state trooper didn't really hit me, but tapped me on the shoulder with his stick and told me to lay face down on the ground and I did. He, – the same trooper later came, you know, a little while later because the yard was filling up, came over to me and kicked me in the side and told me to get moving with my hands on my head, face on the ground and start crawling across the yard, and so I did. And I crawled until I got to the other end of the yard and there I just laid.

Q. And at that time did something else happen to you while you were laying on the ground in A Block Yard?

A. Not when I was laying on the ground, but after laying there for a while, a state trooper came up to me and told me to stand up and strip.

Q. When he said "Strip", what did he mean, sir?

A. He mentioned take my clothes off. He grabbed hold of my watch because I wasn't undressing fast enough and he ripped that off and when I started unbuttoning my shirt, he said, you know, "To hell with unbuttoning it", he said "Rip the buttons off", so I did, and after I undressed there was a line forming in the yard.

Q. A line of what, sir? Composed of what?

A. Of inmates.

Q. How were they dressed?

A. Everybody was stripped.

Q. Do you mean naked?

A. Naked, and he told me to join that line and I did. I followed the line along. It was heading for the A Block door into the A Block corridor and I was almost up to the door when an officer signaled me out, and pulled me aside to the left of the A Block door. He, – he says "What's your name?", and I said "It's Haynes". He says "You were on TV, weren't you?"

Q. Based upon the conversation you had with the officer at that time, was anything done, sir?

A. Yes sir. He made me lay down on the ground on my back and put my legs up, you know, curled up, and he put a shotgun shell on my knee and he told me if I dropped it I was dead.

Q. You mean you were laying on your back and how were you dressed at that time?

A. I was naked.

Q. You said your legs were bent?

A. Yes, my legs were bent.

Q. And there was a shotgun cartridge placed on top of one knee?

A. Yes sir, on top of the right knee.

Q. Did you do this?

A. Yes sir. I was scared.

Q. And how long did you remain in that position?

A. I was there, I would say for an hour, hour and a half.

Q. And during that period of time, that hour to hour and a half, did anything else take place?

A. Yes sir. The state troopers up on top of the catwalk were spitting on me and dropping lit cigarettes.

Q. Just a second, please, Mr. Haynes. You were laying on the ground in exactly what location of A Yard, if you can remember?

A. I was to the left of A Block door on the ground, my head was resting, you know, touching the A Block corridor.

Q. Is there a catwalk close to you?

A. There is a catwalk straight directly over my head.

Q. Was there anybody on the catwalk?

A. Yes sir, there were state troopers there.

Q. And what, if anything, was done at that time?

* * *

Civ. 1971-410

AFFIDAVIT

I Jerome Rosenberg being duly sworn, says and deposes.

That I lock in cell CW-19 located in HBZ, that on February 22, 1972 at about 1:30 or there about, Milton Jones another inmate was brought pass my cell to go to the yard by two officers, subsequently within a minute thereafter inmate Jones was being punched in the neck by officer Miller and another officer kneed him in the back and side. This occurred within five feet from my cell and I saw it all clearly shortly thereafter both officers brought him back saying he wasn't going to the yard, near his cell he was again pushed and hit, other inmates saw that, I could not, but I heard it. Inmate Jones locks in 11 cell. Subsequently I called the one officer whom I did not know by name and asked him for his badge number and name. He asked me why, I explained that I was acting as and in the capacity of a legal advisor to the other inmate whom I saw you beat and that I was going to file charges against them in violation of an injunction signed by Judge Curtin, whereas the officer said "fuck Curtin's" order and the sergant said not to give my number or name. I give this true affidavit of my own free will.

/s/Jerome Rosenberg

Jerome Rosenberg
21478
Box 149
Attica, NY 14011

Sworn to before me this 23 day
of February 1972
/s/Edward V. Brady
Edward V. Brady
Notary Public, New York State
Residing in Genesee County
Commission Expires March 30, 1973

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 686, 687, 688 - August Term 1990

Argued: January 10, 1991 Decided: February 27, 1991

Docket Nos. 90-2287, -2289, -2291

AKIL AL-JUNDI, et al.,

Plaintiffs-Appellees,

- v -

VINCENT MANCUSI, KARL PFEIL, RUSSELL G. OSWALD,

Defendants-Appellants,

THE ESTATE OF NELSON A. ROCKEFELLER, et al.,

Defendants.

Before: KAUFMAN, NEWMAN, and McLAUGHLIN, *Circuit Judges.*

PETITION FOR REARGUMENT AND SUGGESTION FOR HEARING IN BANC FOR DEFENDANT-APPELLANT VINCENT MANCUSI

RICHARD E. MOOT
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Dated: March 12, 1991

Reasons for Panel Rehearing

1. The panel misapprehended defendant Mancusi's Argument. Mancusi argued that the Supreme Court's holding in *Whitley v. Albers*, 475 U.S. 312, 320 (1986) which protected Governor Rockefeller under the doctrine of qualified immunity from any liability for the alleged brutality and reprisals during the rehousing, *a fortiori* protected the defendant Mancusi. (Mancusi Brief ("Man. Br.") 11, 12.) The Governor put Major Monahan in charge of the retaking which included the return of the prisoners to their cells. This was when the reprisals allegedly took place. Mancusi had no command or authority over this phase of the retaking. (JA 94-101, 276, 790, 791.) His responsibility was custodial after the prisoners had been returned to their cells. (JA 467.)

2. Defendant Mancusi never argued that the Victory and Rosenberg affidavits "are unworthy of belief" because "the testimony of criminals is incredible as a matter of law when it accuses them [prison officials] of unconstitutional conduct." It was instead defendant Mancusi's argument:

> (i) that the affidavits were unworthy of belief as a matter of law because the overwhelming contemporary evidence of eyewitnesses is to the contrary (Man. Br., 15);
>
> (ii) the affidavits were taken by plaintiffs' counsel from their own clients only days prior to the argument on the motion for summary judgment and more than eighteen years after the events recounted (Man. Br., 4,7);
>
> (iii) the affiants were interested parties in the action, each claiming to recover $1 million in damages on the basis of their affidavits (Man. Br., 9; JA 731);
>
> (iv) under the Supreme Court *Celotex* Trilogy (*Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct.

2548, 91 L. Ed. 2d 265 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed 2d 202 (1986); *Matsushita Electrical Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)), such affidavits cannot overcome years of discovery which produced no issue of fact. (Man. Br., 9.)

3. The panel overlooked the following undisputed facts:

(i) the factual finding of the exhaustive MacKay Commission that Mr. Mancusi remained at this desk and did not have knowledge of the alleged reprisals (Man. Br., 16; JA 790-791);

(ii) photographs which establish that neither A nor D Yard were visible from Mr. Mancusi's office (JA 779, 804-805);

(iii) the admission by plaintiffs' counsel themselves in their prior memorandum that Mancusi never went into the prison on the day of the reprisals (Man. Br., 7; JA 779);

(iv) that plaintiffs' counsel studied millions of documents for thousands of hours over 2 1/2 years but, absent the Victory and Rosenberg affidavits, had no evidence whatsoever that Mr. Mancusi left his office or had personal knowledge of the reprisals which allegedly took place while Major Monahan and the troopers were completing the retaking by returning the prisoners to their cells. (Man. Br., 5; JA 779.)

Reasons for Rehearing In Banc

1. The application of the *Albers* qualified immunity doctrine by the prior panel correctly granted qualified immunity to the Rockefeller Estate. The present panel misapplied the doctrine in denying the same relief to defendant Mancusi.

2. The panel failed to follow the Supreme Court's teaching of the *Celotex* trilogy. In holding that the Victory and Rosenberg affidavits presented a question for the jury, the panel disregarded the overwhelming evidence that Mr. Mancusi did not witness the reprisals (including plaintiffs' own earlier admissions) in favor of the non-probative affidavits.

3. The panel improperly failed to exercise its discretionary pendant jurisdiction to consider the other grounds for dismissal urged by defendant Mancusi. This case, if remanded for a trial which results in a verdict against the defendant Mancusi, will again require this Court to consider the same arguments for dismissal on behalf of Mr. Mancusi which the panel refused to entertain on this appeal.

4. The intervening trial will be lengthy, expensive and rekindle the Attica fires of racial hatred, all to no avail if this Court ultimately concurs that this litigation now in its seventeenth year should long since have ended.

5. In any event, with the dismissal of this suit against Governor Rockefeller's estate, any verdict against the remaining individual defendants would be a pyrrhic victory and produce no meaningful result on behalf of the 1,200 members of the plaintiff class who seek $4 billion in damages. A verdict against defendant Mancusi, if ultimately affirmed upon appeal, would only wipe out the modest retirement savings of Mr. and Mrs. Mancusi and add the destruction of their personal lives to the other sufferings of the Attica rebellion.

6. The course which the panel's decision has set for continued litigation of this case will bring no meaningful good to the litigants on either side. The present decision, if not set aside and the case dismissed, also will bring public discredit to the Federal judicial system of which this Court is such an important part.

The Pertinent Facts

The overall factual setting of this case is best found, as the panel noted, in reading this Court's prior opinions in *Inmates*

of Attica Correctional Facility v. Rockefeller, 453 F. 2nd 12, 22-24 (2nd Circuit 1971) and *Al-Jundi v. Estate of Rockefeller*, 885 F. 2nd 1061 (2nd Circuit 1989) ("*Rockefeller I*"). The pertinent facts for this Petition for Reargument and Suggestion for Hearing In Banc can be briefly stated. We begin with the names of the principal defendants and the role of each of them in the Attica rebellion.

Governor Rockefeller — The Governor ordered the retaking by force. He put Major Monahan of the State Police in charge. (JA 34,35.) He was in constant telephone communication with his personal representative, Mr. Douglas, Secretary to the Governor, who was at Attica throughout Saturday, Sunday and Monday, the day of the retaking. Mr. Douglas gave the Governor an eyewitness description over the telephone of what was happening during this period. (JA 294.) Contemporary affidavits made following the rebellion stated that the Governor had been advised a massacre would likely result (JA 293) and that "rumors of inmate atrocities and the growing anger, frustration and racial hatred, any black skin inside the prison would be treated as enemy skin." (JA 292.) The Governor is now dead. A prior panel in *Rockefeller I* held that the Rockefeller Estate, notwithstanding the Governor's control and knowledge of events, was protected by the doctrine of qualified immunity. The Court in *Rockefeller I* dismissed all claims against the estate including damages for the alleged brutal reprisals carried out by Major Monahan's men.

Russell G. Oswald — was Commissioner of the Department of Correctional Services of the State of New York of which the Attica Correctional Facility was only a part. He was the senior corrections official on the scene. (*Al-Jundi v. Mancusi, Pfeil, and Oswald*, Nos. 686, 687, 688, slip op. at 2200 (2d Cir. February 27, 1991)). He is now dead, having died a few days after receiving news of the panel's decision. He and his widow have no significant assets.

Walter Dunbar — was Executive Deputy Commissioner of the Department of Correctional Services of the State of New

York. As Mr. Oswald's Deputy, he was in the prison during the retaking and the return of prisoners to their cells under the direction of Major Monahan. He is now dead. His estate has not been made a party to the action.

Wim Van Eekeren – was Deputy Commissioner for Programs at the Department of Correctional Services under Oswald. He was present at the scene during the events of the rebellion. His right arm and leg are paralyzed from a stroke and he requires a brace to walk. He was never properly served or made a party to the action.

John C. Miller – was Chief Inspector of the Division of State Police and the top ranking State Police officer on the scene. He is now dead. His estate has not been substituted as a party.

John Monahan – was Commander of Troop A of the New York State Police, Batavia, New York. He and the men under his command were ordered by the Governor to retake the prison and return the prisoners to their cells. He and his men were in control of D Yard where the rebellion was subdued and A Yard where the prisoners were stripped, searched and allegedly brutalized while being returned to their cells in the final phase of the retaking. Major Monahan is dead. Inconceivably, the District Court has elected to substitute his no-asset estate as a defendant in this action.

Major General John C. Baker – was Commander of the National Guard of the State of New York and Chief of Staff to defendant Rockefeller. He was responsible for the medical care during the retaking. His Motion for Summary Judgment was "in all respects granted" and the complaint dismissed against him more than 10 years ago by order of the court dated October 20, 1980. He has had several strokes and is no longer able to testify.

A. C. O'Hara – was Commissioner of the Office of General Services of the State of New York. He is dead and his estate has not been made a party.

Vincent Mancusi – was Superintendent of the Attica Correctional Facility. Superintendent Mancusi was replaced by Commissioner Oswald who took command of the Attica facility when he arrived days before the retaking. (JA 276.) Mr. Mancusi, under Oswald's command, remained responsible for the custody of those prisoners who remained in their cells and were not a part of the rebellion. (JA 467.) The MacKay Commission, after interviewing 2,594 eyewitnesses, found as a fact that Superintendent Mancusi remained in his office throughout the retaking, including the return of the prisoners to their cells and that Mr. Mancusi had no knowledge of the reprisals. (JA 790,791.)

Karl Pfeil – was Assistant Deputy Superintendent of the Attica Correctional Facility. His role was to assist Superintendent Mancusi with respect to the custodial care of the inmates.

Robert F. Fischer – was Deputy State Attorney General of the State of New York in charge of investigating the uprising and subsequent prosecutions. He and other named defendants are no longer parties to the action. The "bad faith prosecutions" which were allegedly the Deputy State Attorney General's responsibility have been dismissed.

All other defendants – all other named defendants either were not made parties to the action or have subsequently been dismissed as parties.

It can no longer be fairly said that this is a suit against "senior correction officials of the State of New York." *Al-Jundi v. Mancusi, Pfeil, and Oswald*, Nos. 686, 687, 688, slip op. at 2194. All of Mr. Mancusi's superiors are now dead or the action has been dismissed against them. Only Mr. Mancusi and Mr. Pfeil remain as defendants individually (rather than in any official capacity). There is no claim against the State official or the State, nor can there be. *Will v. Michigan Dept. of State Police*, 109 S. Ct. 2304 (1989).

The facts with respect to the defendant, Superintendent Mancusi, are stated with particularity and without equivocation in

his affidavit. (JA 94-101.) He was at no time personally involved in the retaking of the prison or the return of the prisoners to their cells. (JA 46, 97, 276, 790, 791.) He had no knowledge of the alleged reprisals and brutality committed in D Yard or A Yard by men under the command of Major Monahan. (JA 790, 791.) His affidavit is in all respects sustained by the factual finding of the MacKay Commission that he remained in his office and had no knowledge of the reprisals. (JA 790, 791.) The MacKay Commission finding on behalf of Superintendent Mancusi was supported by the interviews of 1,600 inmates, 400-450 correction officers, 270 State personnel who participated and had direct knowledge of the riot, 100 sheriffs, under-sheriffs and deputies who were inside the walls, Commissioner Oswald, Deputy Commissioner Dunbar, 24 citizen observers, 200 National Guardsmen and their commanding officer, General Baker, all of whom had firsthand knowledge of the material facts as well as Governor Rockefeller and his staff. (JA 796-802.)[1] Moreover, plaintiffs' counsel themselves earlier admitted that Mr. Mancusi was not in the prison or on the catwalk during the day when the reprisals took place. (JA 779.)

Legal Argument

The *Albers* doctrine, which a prior panel found in *Rockefeller I* protected the Governor's estate under the doctrine of qualified immunity, also protects the defendant Superintendent Mancusi. In an attempt to avoid this clear result, plaintiffs, for the first time in the seventeen year history of this litigation, claim in *direct contradiction* to their own earlier admissions that Mr. Mancusi witnessed the reprisals. When weighed against all of the evidence

[1] The prompt trial ordered by the panel will not be so prompt if defendant Mancusi is given an opportunity to meet the last minute claim of the Victory and Rosenberg affidavits. A reasonable effort in preparation would require an attempt to interview these 2594 witnesses whose testimony supported the McKay finding that Mr. Mancusi never left his office. Counsel for defendant Mancusi stated at the argument that further discovery would be needed if the Victory and Rosenberg affidavits were found probative.

in this case, plaintiffs' abrupt change in position is revealed for what it is, a recent fabrication to avoid summary judgment. It should not be countenanced by this panel.

All of the probative evidence submitted in this case shows that defendant Mancusi was not a witness to the reprisals. In addition to Defendant Mancusi's own affidavit and the findings of the MacKay Commission, plaintiffs' counsel has admitted in its memorandum in opposition to the November 26, 1987 Motion for Summary Judgment of the Estate of Rockefeller that defendant Mancusi was *not* in the prison or on the catwalk during the day when the reprisals took place. (JA 779.)

Plaintiffs' counsel signed its memorandum pursuant to Rule 11 of the Federal Rules of Civil Procedure thereby certifying that

> to the best of the signer's knowledge, information and belief formed after reasonable inquiry it is well grounded in fact . . . and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. Rule 11 FRCP.

Indeed, plaintiffs' counsel have affirmatively stated that they examined millions of documents for thousands of hours over a 2-1/2 year period prior to making this admission. (JA 779.) This Court can accept these admissions by plaintiffs' counsel as proof that Mancusi was not a witness to the reprisals. *See, e.g., United States v. McKeon*, 738 F.2d 26, 31 (2d Cir. 1984) (the law is quite clear that superseded pleadings constitute the admissions of a party-opponent and are admissible in the case in which they were originally filed as well as in any subsequent litigation involving that party); *Kunglig Jarnvagsstyrelsen v. Dexter & Carpenter*, 32 F.2d 195, 198 (2d Cir. 1929) (a pleading prepared by an attorney is an admission by one presumptively authorized to speak for his principal).

Having made their admissions and having done so concededly after much examination, plaintiffs nonetheless now claim in

direct contradiction of their earlier admissions, that Mancusi was on the catwalk. In alleged support of their new position, plaintiffs offer as evidence the perfunctory and self-serving affidavits of plaintiffs Victory and Rosenberg. Hence, plaintiffs completely contradict their earlier statements *not* on the basis of any newly discovered facts or testimony, but on their own conclusory statements which could have been raised by them during the 1987 Motion for Summary Judgment by the Estate of Rockefeller. Instead, in 1987, plaintiffs alleged "facts" which supported their theory of the case at the time. Today, they apparently find another version of the "facts" preferable for their present purposes. As this Court noted in *McKeon*,

> A party . . . cannot advance one version of the facts in its pleadings, conclude that its interests would be better served by a different version, safe in the belief that the trier of fact will never learn of the change in stories. *United States v. McKeon*, 738 F.2d, 31.

In the present case, the plaintiffs have asked the panel to allow them this convenient alteration of the "facts." By holding that the Rosenberg and Victory affidavits warrant a full-blown trial, the panel has allowed plaintiffs to defeat defendant Mancusi's motion for summary judgment on the basis of alleged "evidence" which fails to meet the test of the Supreme Court's *Celotex* trilogy.

The Supreme Court's decisions in the *Celotex* trilogy – *Matsushita*, 475 U.S. 574; *Anderson*, 477 U.S. 242; and *Celotex*, 477 U.S. 317 – are a "signal to the lower courts that summary judgment can be relied upon more so than in the past to weed out frivolous lawsuits and avoid wasteful trials." 10A C. Wright, A. Miller & M. Kane, Federal Practice and Procedure, §2727 (2d Ed. 1983), pocket part, 28 (1990). In *Celotex*, the Court held that summary judgment is not a disfavored procedural shortcut but a "just, speedy, and inexpensive" determination of every action. *Celotex*, 477 U.S., 327. The Court noted that

> Rule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried by a jury, but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the rule, prior to trial, that the claims and defenses have no factual basis. *Celotex*, 477 U.S., 329.

In *Matsushita*, the Court held that "If the factual context renders respondents' claim implausible . . . respondents must come forward with more persuasive evidence to support their claim than would otherwise be necessary." *Matsushita*, 475 U.S., 586. The Court also concluded that

> [W]here the record taken as a whole could not lead a rational trier of the fact to find for the nonmoving party there is no "genuine issue for trial." *Id.*, 586.

In the present case, the factual context clearly requires plaintiffs to come forward with more persuasive evidence than the Victory and Rosenberg affidavits. These affidavits are unworthy of belief as a matter of law not because they are the testimony of convicted criminals[2] but because the overwhelming evidence of 2,594 witnesses who testified reasonably contemporaneously with the events of the rebellion are contrary to the self-serving affidavits of individual plaintiffs in the action which are made for the first time almost twenty years after the event.

In *Anderson*, the last case in the *Celotex* trilogy, the Supreme Court rejected an argument that summary judgment can be defeated by any alleged evidence, regardless of its caliber or quantity. The Court held:

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[2] An examination of all three defendant-appellants' briefs and the transcript of oral argument will show that at no point did appellants make this argument. It was an argument offered by Judge Newman during questioning from the bench. It has no support in the record.

> [T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party . . . If the evidence is merely colorable . . . or is not significantly probative . . . summary judgment may be granted. *Anderson*, 577 U.S., 249-250 [citations omitted].

The Victory and Rosenberg affidavits not only are not "significantly probative" but are at odds with plaintiffs' earlier admissions. These affidavits are therefore insufficient to defeat defendant Mancusi's motion for summary judgment. *See, Albertson v. T.J. Stevenson & Co., Inc.*, 749 F.2d 223, 228 (5th Cir. 1984) (the nonmovant cannot manufacture a disputed material fact where none exists. Thus, the nonmovant cannot defeat a motion for summary judgment by submitting an affidavit which directly contradicts, without explanation, his previous testimony).

The Supreme Court also held in *Anderson* that the standard for granting summary judgment

> mirrors the standard for a direct verdict under Federal Rule of Civil Procedure 50(a), which is that the trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict.

Anderson, 477 U.S., 250. The overwhelming evidence constituting the record on this appeal is contrary to the Victory and Rosenberg affidavits. If remanded for trial, there can be but one reasonable conclusion as to the verdict. *Anderson* dictates the same standard shall be applied here and that as a matter of law, the Victory and Rosenberg affidavits are not sufficiently probative to raise a genuine issue of fact. Defendant Mancusi's Motion for Summary Judgment therefore should be granted.

Conclusion

The prior panel in *Rockefeller I* correctly afforded the Governor the defense of qualified immunity. Mr. Mancusi is entitled to the same defense.

Under the extraordinary circumstances of this case, the self-serving affidavits of individual plaintiffs are not sufficient to overcome the overwhelming testimony and the facts reported by the official MacKay report which was based upon contrary contemporary sworn testimony of 2,594 witnesses. Nor may these affidavits be used to contradict plaintiffs' own prior admissions.

It is respectfully urged that the defendant Mancusi be granted reargument of this appeal and it is further respectfully suggested that the hearing be in Banc.

Dated: March 12, 1991

/s/Richard E. Moot

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CERTIFICATE OF SERVICE

I, RICHARD E. MOOT certify that I served the Petition for Reargument and Suggestion of Hearing In Banc for defendant-appellant Vincent Mancusi on all counsel to this Appeal by mailing two copies of the same on March 12, 1991 to each of them as their names and addresses appear below;

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Richard E. Moot

Dated: March 12, 1991

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

AKIL AL-JUNDI, et al.,

Plaintiffs,

-v- Civil No. 75-132E

THE ESTATE OF NELSON A. ROCKEFELLER,

Defendants.

PLAINTIFFS' PRE-TRIAL STATEMENT

Now come the plaintiffs, by their undersigned counsel, and submit the within pre-trial statement, pursuant to Rule 16(d) of the Local Rules for the Western District of New York. Plaintiffs wish to draw the attention of the Court and defendants to the motion *in limine* contained in Section II-B-2 hereof, on page 33, and to notify the defense of plaintiffs' intention to offer in evidence various official reports, listed in Sec. IV-II-I, at p.56, pursuant to Rules 803(8)(C) and 803(24).

Additionally, plaintiffs request that, if they have not already done so, defendants be required by the Court to submit their own pre-trial statements, forthwith.

I. STATEMENT OF FACTS

A. *Undisputed Facts*

1. Defendant John Monahan was a major in the New York State Police and Commander in charge of Troop A, Batavia, New York. He formulated the assault plan, and was in direct command of the force of troopers, Genesee Park police and guards which stormed the D-Block yard at Attica Prison on 9/13/71.

2. After an issue arose about the respective jurisdiction of the State Police and Corrections Department officers, the local commanders of the two agencies, Major Monahan and Warden Vincent Mancusi, co-executed the following written agreement:

> In order to clarify the orders concerning command, a joint operation is being carried on at the Attica Corr. Facility by the Dept. of Corr. Services and the State Police. In the event of the need for a custodial decision, command remains with the Correctional employees, whereas in the need for command of police matters such as an assault thrust the command will rest with the State Police. Each agency will cooperate with each other at all times.
>
> /s/ Vincent R. Mancusi
> /s/ John W. Monahan

3. As of September, 1971, there was a pre-set plan prescribing use of the National Guard for the control of civil disorders with minimal violence, which was known to Monahan and other State Police officials, but was ignored in planning and executing the retaking of the prison.

4. The plan, known as "Operation Plan Skyhawk", provided for strict limits on the use of deadly force, required strong command supervision — particularly as to the use of weapons — and prohibited the use of .00 buckshot in shotguns.

5. The riot control training of the state police was limited to tactics for use in open areas, where rioters could be dispersed by using gas and batons.

6. The troopers had no training or practice in operations where they would function in squads or platoons.

7. Defendant Monahan knew the State Police had been given no training or practice to prepare them for firing weapons through teargas.

8. In carrying out the retaking plan, no effort was made by Monahan to screen the troopers who would participate in order to determine their individual suitability to be involved in the assault.

9. Other than the .270 rifle marksmen who were selected solely for their weapons prowess, all troopers were considered to be equally available and equally qualified for participation in the assault.

10. No inquiry was made by Monahan or those in his command as to the individual troopers' prior military or riot control experience.

11. No attempt was made by Monahan or his command to identify individual troopers who had personal relationships with correctional officers or hostages.

12. Less than one-third of one per cent of the State Police were Black or Latin in September, 1971, and no Blacks or Latins were included in the Attica assault force.

13. Major Monahan's assault plan did not provide for a prior warning to the prisoners that there would be an armed assault, and no warning was given.

14. The plan contained no provision or means for orders by commanders or supervisors which would start, stop, or otherwise control the use of gunfire by the officers in the various units, or "details", of the assault force.

15. Few of the troopers had radios, and the large details contained no subordinate leaders to relay commands. Some detail commanders were not even aware which men were assigned to their command.

16. Since the troopers wore gas masks which were not equipped with communication devices, and no hand signals were arranged, meaningful communication among members of the assault force was essentially impossible.

17. The detail commanders were the only ones in a position to receive orders to cease fire and it was physically impossible for them to communicate to other members.

18. The decision to use force during the assault, including deadly force, was left to the discretion of each individual officer.

19. While some men were instructed to fire only at inmates engaged in overt, hostile acts, no one received any specific guidance as to what constituted such acts.

20. Briefing of the assault force was done in general terms to large groups *en masse*, with no effort or time allowed to ensure that each man understood his obligations. Major Monahan established no specific procedure for instructing the individual troopers on the action and behavior expected of them during the assault.

21. The one order approved by Monahan which was widely disseminated was for officers to avoid hand to hand combat, so as to prevent at all costs any weapons being taken by prisoners.

22. Throughout the waiting days, numerous racist comments and threats were directed by the waiting assault force toward the rebelling inmates, the observers, and on several occasions even Commissioner Oswald. The exchange of abusive language between inmates on the catwalks and the troopers and correction officers continued and escalated.

23. By the end of Saturday night, September 11, 1971, many troopers had become tired, restless, frustrated and increasingly angry.

24. On Sunday before the assault a Spanish-speaking prisoner in C-Block, who had traded abusive comments with a trooper the day before, was taken out of his cell and beaten up by a trooper while other police and correctional personnel stood by.

25. By Monday morning, the troopers and guards who would form the attack force were even more exhausted and frustrated, and further enraged by false rumors of atrocities against hostages by prisoners.

26. Neither the defendants or anyone in their command took any steps to dispel these rumors, although they were fully aware that no hostages were harmed after the initial rebellion on September 9, 1971.

27. The hostages were interviewed by members of the press as late as September 12, 1971, and reaffirmed that they were being treated in a humane way.

28. The hostages when interviewed on September 12, 1971, expressed the belief that an armed assault would result in their deaths.

29. In approving the decision to retake the prison by force, Governor Rockefeller made one specific order as to its implementation: that members of the Corrections Department were to be excluded from the assault force. The Governor believed it was "humanly impossible" for the prison guards not to be "emotionally involved", because their colleagues had been injured and taken hostage, so that the risk of reprisals against the prisoners by the guards was too great. Just two guards were to accompany the assault force, solely to identify the hostages.

30. Major Monahan was specifically told of Gov. Rockefeller's order by Supt. Miller, and considered it binding on him.

31. The State Police commanders were never given direct orders to exclude correction officers from entering the prison as part of the assault force.

32. Warden Mancusi and Commissioner Oswald were also specifically advised of the order excluding correction officers but never communicated that order to their subordinates.

33. Instead, Mancusi gave the order that corrections officers were to accompany the troopers as "back-up", and to act or fire only when directed to do so by a member of the State Police.

34. Major Monahan obtained the CS gas and the helicopter which dropped the gas from the National Guard. He did not ask for or obtain anything else from the National Guard, not military expertise, ammunition, weapons, or supplies.

35. The CS gas used in the helicopter drop was known to incapacitate humans in 10-15 seconds by putting them "on the ground", leaving them immobilized and defenseless.

36. Major Monahan knew that his assault plan offered no hope of preventing the prisoners from harming or killing the hostages if they wished to do so.

37. The prisoners in D yard had no firearms.

38. The troopers and guards began shooting at the same moment the gas was dropped into the yard by helicopter.

39. The second helicopter did not begin to broadcast the statement, which directed the prisoners to put their hands on their heads and surrender, and assured them they would "not be harmed", until well after the shooting was underway.

40. The warning was given only in English even though the defendants knew that there were a substantial number of prisoners who spoke only Spanish.

41. The State Police used shotgun shells loaded with .00 buckshot, the largest gauge. One round of .00 buckshot contains 9-12 pellets. Fired at a distance of 50 yards, three to five of the pellets will go wide of a human target. The pellets would eventually spread in a 30 yard radius. In the crowded and confined area of D yard, the firing of such ammunition was certain to hit unintended victims.

42. Major Monahan made no request that less lethal birdshot be obtained, and made no other order as to type of ammunition to be used.

43. Major Monahan's assault plan contained no specific safeguards to avoid hitting unresisting inmates with stray gunfire.

44. State Police sharpshooters used .270 caliber, unjacketed (dum dum) bullets, which are designed to explode into fragments upon impact, so as to cause maximum damage and gaping internal wounds to human targets. They are outlawed by the Geneva Convention.

45. Major Monahan was aware of the nature of this ammunition.

46. The shooting lasted between for at least six minutes. Thirty-nine people, including 29 prisoners and 10 hostages were killed or died later, and an additional 85 prisoners and five hostages were wounded, so that more than ten percent of the people in the yard were struck with gunfire. The majority of the wounded were hit in the yard with stray .00 pellets.

47. State Police records show that between 2,349 and 3,132 lethal bullets or pellets, including eight rounds of .357, 27 rounds of .38, 68 rounds of .270, and 261 rounds of 12-gauge .00, were fired in or into the prison yard.

48. Forty-six .00 pellets were removed from 32 bodies. .357 magnum pistol slugs were removed from 3 bodies. Fourteen .270 high caliber bullets were removed from 14 bodies. Four single shotgun slugs, known as "deerslugs", were removed from three bodies.

49. The troopers themselves acknowledged firing 364 rounds, correction officers 74 rounds, Genesee County Park personnel 12 rounds.

50. Only the National Guard, which did no firing, made a physical inventory of ammunition provided and returned.

51. Monahan's assault plan provided no procedures for determining individual accountability for shots fired, or which officers carried which weapons or were issued which ammunition, thus assuring anonymity to members of the assault force from subsequent identification by ballistic examinations.

52. New York State Police Manual required each trooper to account for each shot he fires.

53. The police failed to follow their standard procedure for collecting and tagging expended cartridges at Attica.

54. The state police failed to follow their standard procedures for executing standardized forms regulating the use of weapons.

55. The state police video and photo documentation failed to record the shooting by the assault force.

56. Omitted.

57. The state troopers and correction officers who fired their weapons gave exaggerated, embellished and fabricated accounts of the circumstances surrounding their discharge of weapons.

58. In one instance Monahan was part of a decision to allow a State Trooper (Barbolini) who had admitted that he lied about a weapon he said he seized from an inmate, and fabricated a story of why he shot and killed an inmate, to simply resign with no further action against him.

59. Supervisory and investigative personnel including Monahan ignored standard state police procedure when they failed to record the locations of the dead and wounded, and the ammunition recovered, they buried all of the physical evidence left in D yard, thereby ruining it.

60. Supervisory and investigative personnel including Major Monahan allowed individual troopers to move items found in the yard.

61. Major Monahan burned the writings, memoranda, notes, correspondence and other materials pertaining to Attica which he had in his possession, including his notes on the assault plan, in the fireplace in his home after the discharge of the Grand Jury, despite his knowledge that he was a defendant in the instant case and other civil lawsuits relating to the assault which were still pending.

62. Russell Oswald was the Commissioner of Corrections for the State of New York, the ultimate man in charge of all state operations at Attica during the days between September 9 and 18, 1971.

63. Vincent Mancusi was the warden at Attica Prison and was the direct supervisor of all correctional employees at Attica Prison between September 9-18, 1971.

64. Both Oswald and Mancusi were privy to discussions of the possible storming of the prison yard during the first four days of the rebellion, and to the plan for retaking ultimately devised by Major Monahan. In particular, they knew of the firepower which would be unleashed against the prisoners in D yard.

65. Oswald knew of the tension, resentment and deteriorating morale of the assault force.

66. Oswald himself was the object of taunts and racial insults from Attica corrections officers for his initial decision to negotiate with the prisoners.

67. Oswald knew of the rumors of supposed atrocities by prisoners against hostages which were circulating among members of the assault force.

68. Oswald knew that these rumors of atrocities were false but did nothing to counteract them.

69. Oswald understood and expected that the assault would result in deaths and injuries.

70. Oswald's only act to prepare for the medical needs which would arise from the assault was to speak with Mancusi about the availability of the prison doctors, Sternberg and Williams.

71. Oswald knew that one of the main grievances of the rebelling inmates was the incompetent and contemptuous medical care provided by these doctors.

72. Williams and Sternberg were the only doctors present at Attica at the time of the assault.

73. Dr. Williams was not told there would be an armed assault or what if anything to expect in the aftermath of an assault. He was not consulted about what types of equipment, supplies or medicines might be necessary.

74. Oswald said he assumed the National Guard would also provide medical care, but he took no steps to confirm that expectation with any official of the Guard itself, or to ensure that the National Guard medical teams or other outside doctors would be at the prison when the assault began.

75. The National Guard medical team was still on its way to the prison when the order was given to begin the assault, and did not arrive until after the shooting was over.

76. General Baker, commander of the Guard, was never spoken to by General O'Hara or anyone else on behalf of Mr. Oswald about arranging medical care prior to the assault.

77. The National Guard was never assigned any specific area of responsibility, or asked to be responsible for preparing medical facilities for the wounded and injured. They had received no briefing or information as to the nature of the assault or the medical problems it was expected to cause, and thus had no indication of the medical resources which would be needed to deal with the aftermath of the assault.

78. No arrangement was made to have medical supplies available immediately after the assault; no blood, blood plasma or surgical equipment were available, and no arrangements had been made to provide them.

79. Dr. Worthington Schenk, chief of surgery at Meyer Memorial Hospital, the outside hospital to which prisoners with serious medical problems were normally taken, was not contacted about the potential need for medical and surgical services until Warden Mancusi telephoned him on Monday morning, at least one half hour after the assault.

80. In the phone call, Defendant Mancusi did not give Dr. Schenk any information about the nature or specifics of the disaster-type medical situation which had arisen in the wake of the widespread shooting during the assault. Instead he simply requested the doctor to come out to the prison to assess the situation.

81. When Dr. Schenk arrived, at about 11:00 a.m., he saw immediately that he would need several surgical teams and far more equipment, supplies and drugs than were available.

82. It was close to 1:00 p.m. when the necessary equipment and personnel arrived from Meyer Memorial, and it took the doctors another hour to set up and prepare for the first emergency operations.

83. Even after the surgical equipment had been set up, there was space for no more than three operations to go on at the same time. Consequently, many inmates with gunshot wounds were not operated on until the next day.

84. There was no running water in the prison hospital on the morning of the assault.

85. Regardless of any assessment by the doctors, each case of a prisoner with an injury requiring hospital care had to be personally reviewed and approved by Warden Mancusi before the prisoner could be released for transportation to Meyer Hospital. The process was so lengthy that the first prisoner did not arrive at the hospital until 5:30 in the evening of the day of the assault, almost eight hours after the shootings.

86. Extensive preparations were made to ensure prompt medical attention for the hostages after the assault, including separate ambulances manned by medical personnel for each individual hostage, which were waiting outside the prison to immediately remove them to local hospitals, whose staffs had been alerted and were awaiting their arrival.

87. Defendants would not consider ordering removal of wounded prisoners for treatment at the nearby local hospitals, despite their proximity and apparent readiness to deal with injuries which occurred in the retaking.

88. Oswald was aware of the serious potential for physical reprisals against the prisoners in the retaking of the prison and rehousing of the prisoners. He knew of the prisoners' claim that

there had been brutal retaliations the year before after a minor disturbance at the Auburn prison, and he knew in particular that fear of reprisals, and guarantees of protection against them, was the main concern of the prisoners in the negotiations.

89. Oswald specifically knew that the reason the correction officers were to be kept out of the assault was concern about their ability to control their rage against the prisoners, but he established no plan for the supervision of the officers during the rehousing of the prisoners.

90. Oswald established no process to brief corrections officers as to their responsibility to act with restraint, or to screen correction officers who were emotionally unfit to participate in the rehousing process.

91. Eight days after the assault, members of the Goldman Commission examined 700 inmates who had been in the yard on September 13, 1971, and determined that 45% of those examined still bore physical bruises, lacerations, broken bones, and other marks on their bodies, in evidence of the physical reprisals they had suffered.

92. All inmates had their personal property destroyed, including but not limited to eyeglasses, false teeth, watches and irreplaceable legal papers.

93. Oswald personally toured the prison about an hour after the shooting. He later falsely told the McKay Commission that he had not gone inside until about 4:00 p.m.

94. Oswald was told by Robert Douglass in the presence of John Dunne that Dunne, on a tour of the yard shortly after noon on Monday, had observed acts of brutality against the defenseless prisoners; Douglass admonished Oswald on the importance of avoiding further reprisals.

95. Dunne was "shocked, disgusted and horrified" by what he saw.

96. No action was taken by officials in response to Dunne's report.

97. Commissioner Oswald characterized the brutalization of the prisoners in the A-Tunnel gauntlet as "a good, old-fashioned fraternity hazing".

98. Warden Mancusi was the direct supervisor in charge of the correction officers and the rehousing process.

99. Mancusi knew that the correction officers were emotionally upset before the assault.

100. Mancusi failed to establish any plan to supervise the rehousing of the prisoners, or any policy of briefing the correction officers prior to the rehousing operation.

101. Mancusi allowed his correction officers to join in the assault, as "backup" to the state troopers, despite the Governor's order that they should be excluded because of their emotional condition.

102. Mancusi ordered that the alleged ringleaders be marked with an X on their back and transferred to HBZ.

103. After the assault, Mancusi saw a nude prisoner being run towards "Z" housing block, but he failed to make any personal inquiry as to what was happening.

104. Mancusi received several reports of guard "over-reaction" while he was in the administration office.

105. Numerous other reports of brutality and improper conduct were radioed to the administration office.

106. Defendant Karl Pfeil was the Assistant Deputy Superintendent, a top subordinate of Warden Mancusi. He was specifically assigned to supervise the rehousing of prisoners.

107. Pfeil went to A yard for half an hour, at about 11:00 a.m. on the morning of September 13. He then went to identify the dead hostages. Then he went home, and returned at about 6:00 p.m.

108. The National Guard medics who were in the prison all day on the September 13, 1971, witnessed countless acts of brutality, including but not limited to the beatings with sticks, clubs, gun butts and screwdrivers, the gauntlets in A block, A tunnel and on the way to HBZ, beatings in the hospital, and the torture of a number of plaintiffs.

109. Mancusi and Pfeil toured the prison throughout the night of September 13, 1971 through September 14, 1971.

110. Pfeil was on duty at the prison on the night of the 13th, and refused to obey a federal court order granting access to the prison to a number of doctors and lawyers.

111. Oswald, Monahan, Mancusi and Pfeil all stayed at the prison for several days after the rebellion. All defendants were on duty at the prison through September 18, 1971.

B. *Disputed Facts*

1. After giving the order for the assault to begin, Commissioner Oswald retired to a locked office in the administration building, and—except for a tour inside the prison about an hour after the assault ended—washed his hands of any responsibility for anything which happened to the prisoners, including but not limited to the planning for the obvious medical needs of the wounded and injured prisoners, and failing to prevent interference and delay of seriously needed medical care for numerous prisoners.

2. Beginning immediately after the assault, corrections officers and to a lesser extent state troopers and sheriffs' deputies engaged in frequent and systematic acts of brutality and retribution against prisoners.

3. Oswald deliberstely concealed his early inspection tour from the McKay Commission in order to escape blame for the torture and reprisals which were then taking place.

4. Monahan formulated and implemented the assault plan without concern for the protection of the prisoners from the wanton infliction of pain and suffering.

5. Monahan was present inside the prison for several hours after the assault, and witnessed most of the brutality.

6. Monahan presided over the destruction and non-preservation of physical evidence by the state police.

7. Photographic and videotape evidence of the assault was altered and tampered with afterwards, in aid of the coverup.

8. Supervisory and investigative personnel including Monahan encouraged the assault force shooters to give exaggerated, embellished and fabricated accounts of the circumstances surrounding the firing of their weapons, and facilitated efforts to cover-up unjustified killings.

9. Beginning as soon as the assault was finished, Warden Mancusi closely supervised all activities of the prison staff from a command post in his office in the administration building, per his agreement with Major Monahan.

10. Prisoners were herded through a tunnel and then systematically brutalized and knocked to the ground as they entered A-block yard. They were then required to strip naked and stand in a long line with their hands on their heads until they could enter the A-block tunnel.

11. Once in the tunnel, where the floor was wet and strewn with broken glass, the prisoners were forced to run, walk or crawl through a gauntlet of club-wielding officers who beat them as they went towards the cellblock.

12. Both Oswald and Mancusi learned of the gauntlet in the A-Block tunnel, but failed to take any steps to stop it.

13. When the prisoners reached A-block, another waiting group of officers, striking them repeatedly with fists and clubs, escorted them to cells on the first, second and third floors.

14. Prisoners specially singled out as alleged "ringleaders" were forced to run a similar gauntlet of officers arrayed in a row on the sidewalk in front of the reception building, on their way to Housing Block Z ("HBZ"). These inmates were repeatedly struck with fists sticks, boots, and other weapons as they ran through this gauntlet.

15. Mancusi observed and was told of the torture and brutality committed against the inmates assigned to HBZ and he did nothing to stop it.

16. Soon after the shooting stopped, plaintiff Frank B.B. Smith, falsely accused of castrating a hostage, was forced to lie naked on a table in A-block yard, with his head, arms and legs hanging off the edges. A football was placed under his chin by officers, who told him that he would be killed if it fell to the ground, and who then proceeded beat and strike him, and burn him at various points on his body with cigarettes and shell casings heated with fire, over a period of some four hours.

17. The hostage that Frank Smith was accused of castrating was Michael Smith who was shot by an automatic weapon and was operated on for his gunshot wounds by 11 a.m.

18. After Frank Smith was taken off the table he was brutalized by guards and troopers at several places within the prison, including the hospital, for several more hours.

19. Mancusi, Monahan, Oswald and Pfeil knew of the torture of Frank Smith and took no steps to stop it.

20. Plaintiff Jerome Rosenberg was severely beaten in A-yard, his ribs were broken and his skull was fractured in full view of defendants Mancusi and Pfeil. Rosenberg was again beaten in HBZ in view of Mancusi and Pfeil.

21. Correction officers prevented the National Guard from providing medical treatment for prisoners who were alleged to be ringleaders, citing orders from Mancusi.

22. Some correction officers dumped wounded prisoners from stretchers and beat them with nightsticks.

23. Correction officers and troopers pulled intravenous fluids out of injured prisoners' arms.

24. Correction officers and troopers poked their gun butts and sticks into the wounds of injured prisoners.

25. Correction officers and troopers used other instruments of torture, including but not limited to screwdrivers, for the purpose of brutalizing the prisoners.

26. Mancusi took a tour of the yard, and watched from the catwalk while Frank Smith and other prisoners were being beaten and tortured by officers in the yard below.

27. When he visited the yard for a half-hour at or about 11:00-11:30 a.m., Defendant Pfeil observed the guards and troopers knocking the prisoners to the ground as they entered the A-Block yard, and then forcing them to strip naked. He took no steps to stop acts of brutality in the yard at that time.

28. On Monday night state troopers and corrections officers continuously threatened, brutalized, and terrorized prisoners in HBZ and throughout the other cellblocks.

29. Warden Mancusi and Assistant Deputy Warden Pfeil were present during much of this activity, particularly in HBZ.

30. Defendant Pfeil threatened the prisoners with death in HBZ and personally beat prisoners.

31. Prisoners were tortured and beaten in the hospital by various officers and others, including Dr. Williams.

32. Prisoners were denied medical care even though their gunshot wounds were obvious.

33. Prisoners were denied medical care because they were labelled ringleaders.

34. Plaintiff Akil Al-Jundi was denied medical care for days even though most of his hand had been blown off by a dumdum bullet. He was tortured and beaten, and gun butts were poked inside his wound. He was taken to HBZ and beaten even though he was seriously wounded and bleeding.

35. Plaintiff Oji Kwesi Sekou, sn. Chris Reed, was given contra-indicated medical care apparently designed to kill him. The gunshot wound in his leg was casted and he was placed in the back of the hospital so that no doctor could find him. He contracted gangrene and lost most of his leg.

36. Countless other acts of brutality were carried out by troopers and corrections officers in retaliation against most of the other individual class members after the yard was retaken.

II-A. ISSUES OF LAW (Proposed Charge to Jury)*

1. Violations of Civil Rights

Plaintiffs' claims are based on the Federal Civil Rights Law, which provides a remedy for individuals who have been deprived of their Constitutional rights under color of state law. That law, §1983 of Title 42 of the United States Code, states in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom or usage of any state, subjects, or causes to be subjected. . . any[one]. . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law. . . .

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* Plaintiffs take this subsection (d)(2) of Rule 16 of the Local Rules of this Court to require "a complete proposed charge to the jury" on the issues of law in a civil rights case, and not also the usual, "boiler plate" instructions given in all cases. The latter can also be submitted, on a moment's notice, if the Court so desires.

The members of the Plaintiff Class, which includes all the prisoners who were in D yard at Attica prison on September 13, 1971, claim that their Constitutional rights were violated in the following ways:

1. By the failure of Defendant State Police Commander John Monahan to prevent the wanton infliction of pain and suffering in planning and directing the retaking of Attica Prison on September 13, 1971;

2. By the failure of Defendant Commissioner of Corrections Russell Oswald in planning and providing for the medical needs of the prisoners who were wounded and injured as a result of the armed assault on D yard; and,

3. By the failure of Major Monahan, Commissioner Oswald, Attica Prison Warden Vincent Mancusi and Assistant Deputy Warden Karl Pfeil to prevent mass reprisals, including the indiscriminate use of unnecessary and excessive force and the deliberate denial of critical medical care, in the early aftermath of the assault and over the following days.

To establish a claim under §1983, the Plaintiffs must show, by a preponderance of the evidence, each of the following three elements:

First, that the conduct complained of was committed by a person acting under color of state law;

Second, that the conduct deprived the Plaintiffs of rights, privileges or immunities secured by the laws of the United States; and,

Third, that the Defendants' acts were the proximate cause of the injuries and consequent damages sustained by Plaintiffs.

42 U.S.C. 1983

2. *Liability of Supervisors*

A supervisory official is personally liable if he knew or should have known for all existing circumstances, of the occurrence of

unconstitutional acts by his subordinates, and demonstrates gross negligence or deliberate indifference by failing to act to stop such practices.

A supervisor is also constitutionally liable for any failure to take appropriate action in the face of a substantial threat of harm, and in failing to take reasonable steps to prevent violations of civil rights which he knew or should have known were likely to occur.

Meriwether v. Coughlin, 879 F2d 1037, 1048 (2d Cir 1989)
Haynesworth vs. Miller, 820 F.2d 1245, 1261 (D.C. Cir. 1987)
Orpiano vs. Johnson, 632 F.2d 1096, 1101 (4th Cir. 1980) Etc.

3. *Cruel and Unusual Punishment*

Under the Eighth Amendment to the United States Constitution, which is binding on defendant state officials through the 14th Amendment, prisoners are entitled to be free from cruel and unusual punishment.

The wanton infliction of pain and suffering in the course of the otherwise lawful use of force in the quelling of a prison disturbance is cruel and unusual punishment which violates the Eighth Amendment.

Deliberate indifference to the serious medical needs of prisoners violates the Eighth Amendment.

The infliction of brutal punishment or physical reprisal, or other use of unnecessary or excessive force against prisoners, violates the Eighth Amendment.

Whitley vs. Albers, 475 U.S. 312, 320 (1986)
Estelle vs. Gamble, 429 U.S. 97 (1976)
Wright vs. McMann, 387 F.2d 519, 525-6 (2nd Cir. 1967)

4. *Liability for Wanton Infliction of Pain*

I instruct you that it has been previously established that excessive force was used intentionally against the prisoners in the initial assault, in which officers under the direct command of defendant Monahan retook the prison yard and ended the rebellion.*

If you find that defendant Monahan, in devising his plan for the assault and/or in supervising or failing to supervise the officers as they carried it out, showed an indifference to the wanton infliction of pain by the officers which was tantamount to a willingness to have it occur, you must find the defendant Estate of Monahan liable to the plaintiffs for this violation of their Eighth Amendment rights.

Whitley vs. Albers, 475 U.S. 312, 320 (1986)
Al-Jundi vs. Mancusi, 2nd Circuit Nos. 90-2287, -2289, -2291; decision of Feb. 27, 1991.
Jones vs. State, 468 NYS 2d 223 (4th Dept. 1983)

* See Motion *in Limine*, below, p. 33.

5. *Liability for Denial of Medical Care*

If you find that the defendant Oswald, once he made the decision and gave the order for the assault to retake the prison yard, was deliberately indifferent to the medical needs that could reasonably be expected to arise in the aftermath of the assault, and that such indifference helped cause any denial or substantial delay of the provision of medical care to prisoners, you must find the defendant Estate of Oswald liable to the plaintiffs for this violation of their Eighth Amendment rights.

Estelle vs. Gamble, 429 U.S. 97 (1976)
Al-Jundi vs. Mancusi, 2nd Circuit Nos. 90-2287, -2289, -2291; decision of Feb. 27, 1991.

6. *Liability for Physical Reprisals*

If you find that physical reprisals or punishments, involving the use of unnecessary or excessive force and/or the denial of medical care, were carried out against members of the plaintiff class after the assault; and that, either,

(1) the defendants or any one or more of them knew, or from all the circumstances should have known that such reprisals were likely to occur, and were deliberately indifferent to the need to exercise reasonable supervision and control of the officers under their command in order to prevent such reprisals; and/or that,

(2) such defendants had actual or constructive notice that such reprisals were in fact occurring in the period after the assault, and were deliberately indifferent to their responsibility to intervene and stop the reprisals, or through their own acts or omissions acquiesced in their occurrence, you must find such defendants liable to the plaintiff class for violations of the Eighth Amendment.

Meriwether vs. Coughlin, 879 F.2d 1037, 1048 (2d Cir. 1989)
Haynesworth vs. Miller, 820 F.2d 1245, 1261 (D.C. Cir. 1987)
Al-Jundi vs. Rockefeller, — F.2d —, (2d Cir. 1989)
Al-Jundi vs. Mancusi, 2nd Circuit Nos. 90-2287, -2289, -2291; decision of Feb. 27, 1991.

II-B. UNUSUAL QUESTIONS OF ADMISSIBILITY

1. *Testimony of Malcolm Bell*

Plaintiffs expect to present Malcolm Bell as an expert witness pursuant to Rule 701 et seq Federal Rules of Evidence and as a summary expert pursuant to Rule 1006 of the Federal Rules of Evidence. Mr. Bell was a member of the Attica prosecution who rose to become the first assistant under Anthony G. Simonetti until his resignation.

The vast majority of Mr. Bell's time as an Attica prosecutor was spent directing the investigation into the use of excessive force, murder and reckless endangerment by state personnel, including some of the defendants herein, in carrying out the assault and the subsequent torture and brutality which followed. While a prosecutor, Mr. Bell spent innumerable hours examining the evidence which will be admitted in this case. He has a complete familiarity with the pictorial evidence, including but not limited to the videotapes, slides and photographs, the ballistic evidence, and the statements of all participants, as well as all other evidence submitted to the prosecution and the grand jury – much of which will be admitted at trial.

One area of particular focus by Mr. Bell was the efforts of the state police including defendant Monahan to cover-up the wrong-doing by the state police and corrections officers involved in the assault on D yard. Therefore his testimony under Rule 1006 would be as a summary expert to synopsize the voluminous body of materials and information which the jury will need to consider as the trier of facts.

In addition, Mr. Bell will testify as an expert pursuant to Rule 701 et seq. There is ample weight to support his admission as an expert under Rule 702, since his knowledge fulfills the two-pronged test required. Given the volume and scope of the evidence – the contradictions between the various statements, the contradictions between the statements and the pictorial evidence, the contradictions between the statements and the ballistic evidence, and contradictions between different statements and testimony given by many of the witnesses in series, his testimony will assist the trier of fact in understanding the evidence and/or determining whether the planning and implementation of the prison retaking operation allowed for the wanton infliction of pain and suffering, and whether defendant Monahan with other state police supervisors attempted to cover-up unjustifiable shootings and beatings that were carried out.

Mr. Bell's years with the Attica prosecution, his role as a primary prosecutor before the supplemental grand jury which investigated the actions of these defendants and their underlings,

and his study which led to the Bell Report, his testimony before the Meyer Commission, and his book *The Turkey Shoot*, Grove Press, 1985, all establish the bases of his knowledge, skill, experience and training which would qualify him as an expert under the rule.

2. *Collateral Estoppel Arising from Previous Judicial Determination that State Officers Intentionally Used Excessive Force in Re-taking the Yard: Request for an In Limine Order*

Plaintiffs believe the determination of the New York State Court of Claims in *Jones vs. State*, that excessive force was knowingly and intentionally used against the prisoners in the assault and retaking of the yard by state forces under the command of Defendant Monahan, is binding on the defense, and that they are collaterally estopped from contesting that finding in the upcoming trial; and we hereby move for an order *in limine* precluding any defense evidence or cross examination of Plaintiffs' witnesses designed to establish the contrary.

The applicable rule provides that where a factual issue has been fully litigated and resolved in a prior action, and the party sought to be estopped (or one in privity with him) had a full and fair opportunity, together with the necessary incentive, to contest it at that time, the privy is precluded from contesting the issue in a later action. *Parklane Hosiery Co. Inc. v. Shore*, 439 U.S. 322, 99 S.Ct 645 (1979). The decision to preclude is a matter for the sound discretion of the Court. It

> has the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation. *Blonder-Tongue Laboratories Inc. v. University of Illinois Foundation*, 402 U.S. 313, 328, 329, 91 S.Ct 1434, 1442-1443, 28 L.Ed.2d 788.

Parklane Hosiery, supra, 99 S.Ct at p. 649.

Here there is no question but that Defendant Monahan was and is in privity with the State of New York, where the State

defended the action in the Court of Claims; and there is no question but that the State's participation there afforded both it and him a full and fair opportunity to contest the issue, in circumstances where their incentive was fully equivalent to his. See, *Williams vs. Bennett*, 689 F.2d 1370 (11th Cir. 1982). Major Monahan testified at length on the issue before Judge Quigley, and vigorously disputed the assertions of the claimants about the use of force in the assault. The State challenged and fought the other evidence submitted by the Claimants to the fullest degree, in a proceeding which took several years to complete, where the charge of intentional use of excessive force was the central issue in dispute. In the circumstances, it is inconceivable that Defendant Monahan could have any more or different evidence to present on this issue.

Moreover, in the context of the case at bar, the issue as to Defendant Monahan's liability to Plaintiffs is not whether excessive force was used; but, rather, as noted above, whether Monahan himself, as commander of the assault force, evinced such an indifference to the wanton infliction of harm on the prisoners, by the officers under his command, as was tantamount to a willingness to have such harm occur. Obviously there is a difference between the two questions, with respect to the volume and complexity of the evidence which would be required to meet the plaintiffs' burden; so the dual purpose of reducing Plaintiffs' burden and serving judicial economy will be well served by an order ***in limine***.

III. WITNESSES

A. *STATE POLICE SUPERVISORY PERSONNEL*

1. George Infante
   Sheriff Albany County
   Courthouse
   Albany, New York 12207

Mr. Infante will testify concerning his role in the planning of the retaking, in the retaking itself, and in the aftermath, including but not limited to his role in the brutality and the destruction of evidence.

2. Robert Horn
Chief – Crime Lab
New York State Police
Albany, New York 12207

Mr. Horn will testify about his role in the retaking and its aftermath including but not limited to his presence at the autopsies and his ballistics examinations.

3. Jerome L. O'Grady
Address Unknown (AUN)

Mr. O'Grady will testify concerning his role as one of the photographers during the events of September 13, 1971 and his subsequent actions concerning the photographs he took.

4. George K. Elbel
AUN

Mr. Elbel will testify concerning his role from the 9th on – including but not limited to his role at the prison before the assault, his role as the supervisor of the .270 sharpshooters on the roof at C block the briefing he received pre-assault and his role in the investigation including the destruction of the evidence.

5. Anthony A. Malovitch
AUN

Mr. Malovitch will testify concerning his role from the 9th on – including but not limited to his role at the prison before the assault, his role as the supervisor as the C catwalk detail, the pre-assault briefing and his role in the investigation.

6. Raymond Slade
AUN

Mr. Slade will testify concerning his role from the 9th on including but not limited to his role in the destruction of evidence.

7. James Russell Tordy
AUN

Mr. Tordy will testify concerning his role from the 9th on including but not limited to his role as the supervisor in A tunnel as well as the pre-assault briefing he received.

8. Blake Muthig
AUN

Mr. Muthig will testify concerning his role from the 9th on including but not limited to his role as the supervisor in C tunnel, the pre-assault briefing and his firing of his shotgun 8 times.

9. John B. Cornell
AUN

Mr. Cornell and the following supervisors will testify concerning their roles from the 9th on, their roles as supervisors of various details of the assault force and in some cases as shooters, the pre-assault briefings and their roles in the rehousing and the investigatory aftermath.

10. K. S. Crouse
11. W. K. Dillon
12. R. J. Dwyer
13. K. E. Gelbart
15. Michael K. Halloran
16. C. J. Henderson
17. R. W. Jones
18. T. N. Kruk
19. J. W. McCarthy
20. A. J. Marchione
21. J. C. Moochler
22. R. F. Orr
23. J. H. Parmeter
24. J. G. Patterson
25. W. L. Shurter
26. Peter P. Zelinski
27. John McCarthy
28. Thomas Balbert

29. SP Investigator Capozzi
AUN

Mr. Capozzi will testify concerning his role in transferring the bodies to Dr. Edland after he realized that the funeral homes had no facilities to conduct the autopsies and his role in other parts of the investigation.

30. Lt. Penfold
AUN

Mr. Penfold will testify about his role as head of the temporary morgue and other duties.

31. Thomas A. Constantine
Superintendent
New York State Police
Public Security Building
State Police
Albany, New York

Superintendent Constantine will testify concerning his role as a member of the assault force, and his activities after the retaking was concluded.

32. Joseph Christian
AUN

Mr. Christian will testify concerning his role in the assault, what he saw, and the injuries he sustained.

B. *STATE POLICE SHOOTERS* (All of their addresses are presently unknown except those that are listed) They will be asked to testify concerning their shooting in D yard, the instructions they were given, their activities and attitudes from the 9th on, and their respective roles in the destruction of evidence, including but not limited to the failure to account for their weapons and ammunition, their use of personal weapons, and the statements that they gave to the State Police after the retaking.

1. Aldo Barbolini
2. Gregory Wildridge
3. James Mittelstaedt

4. Donald Girvin
5. M. J. Clayson
6. Frank Panza
7. M. L. Hegeman
8. (FNU) Panek
9. William V. Minsterman
10. Paul Francis Stringham
11. Ronald John Edgarton
12. Joseph Thomas Cholette
13. Thomas Edward Gregson
14. Terry L. House
15. R. A. Miller
16. Gordon T. Mosher
17. Gordon J. Haska
18. William G. Gethoffer
19. Timothy E. Thisse
20. Nicholas A. Posa
21. R. A. Nitsche
22. G. R. Hopps
23. Thomas E. Griffith
24. Robert L. Stout
25. Arthur Richard Krug
26. David Bush
27. Dennis Spanitz
28. Daniel E. Flynn
29. M. J. Clayson
30. Jeffrey R. Gustafson
31. Richard G. Lavender
32. P. F. Schuchman
33. Bart J. Stack
34. R. R. Pacek
35. Patrick F. McEleney
36. C. W. Frank
37. Richard A. Maraszkiewicz
38. Lawrence Austin
39. Louis Lang
40. Chester Czerminski – Genesee Park Police
41. Seward Munger – Genesee Park Police
42. Burnett Thompson – Genesee Park Police

43. George Akramoff
44. Wayne Bailey
45. Warden Barrows
46. L. P. Bochynski
47. Leonard Bochynski
48. Bruce Brethen
49. R. G. Bubbs
50. J, E. Burns
51. John Cornell
52. D. F. Cornell
53. Patrick Corr
54. Kenneth Crounse
55. Robert Faugh
56. Clifford Gates
57. W. Geothoefer
58. M. Godin
59. William Hockenfort
60. F. J. Hungerford
61. R. T. Janora
62. George Knight
63. Frederick Knapp
64. Edward Konow
65. Peter Lawatsch
66. Michael Leach
67. R. B. Leffler
68. Phillip McGlory
69. Bennet McKnight
70. L. R. McNeight
71. Anthony Marchione
72. Raymond O'Brien
73. E. J. Pauza
74. L. A. Plumley
75. Peter Schuchman
76. Stephen Sharkey
77. William Staples
78. Terry Stroh
79. Charles Van Epps

80. Vincent Tobia
Attorney at Law
42 Delaware Avenue
Buffalo, New York 14202

C. *GOVERNOR ROCKEFELLER'S ADVISORS*

1. Robert R. Douglass
Milbank, Tweed, Hadley & McCloy
One Chase Manhattan Plaza
New York, New York 10005

Mr. Douglass was the Secretary to Rockefeller. He arrived at the prison on September 11, 1971 and thereafter met with the defendants concerning the planning of the assault and served as liaison with the governor. He was there on the 13th and afterwards. His testimony will concern his role at Attica and his contact with Defendants Monahan, Oswald and Mancusi.

2. Howard R. Shapiro
Helm, Shapiro, Anito & Aldrich
111 Washington Avenue
Albany, New York 12210

Mr. Shapiro was first assistant counsel to Rockefeller. He arrived at the prison on September 13, 1971. His testimony will cover the same topics as Mr. Douglass'

3. Michael Whiteman
Whiteman, Osterman & Hanna
1 Commerce Plaza
Albany, New York 12260

Mr. Whiteman was the governor's counsel. His testimony will concern his role in the planning and his contacts with the various dramatis personae.

D. *OBSERVERS* The observers will testify concerning the various attitudes of the assault force during the days of waiting, their contacts with the various defendants and other state personnel, and their experiences on the 13th – how they were treated, what they were told, what they saw.

1. Herman Badillo
   Fischbein, Badillo
   909 3rd Avenue
   New York, New York 10022
2. Assemblyman Arthur O. Eve
   Speaker of the Assembly
   Albany, New York
3. William Gaiter
4. Franklin Florence
5. Robert Garcia
6. James Ingram
   Detroit Police Department
   Detroit, Michigan
7. Clarence Jones
8. William Kunstler
   13 Gay Street
   New York, New York 10004
9. Alfredo Matthew
10. Raymond Scott
11. Lewis Steel
    351 Broadway
    New York, New York 10013
12. Wyatt T. Walker
13. Tom Wicker
    New York Times
14. Bobby Seale
15. Tom Soto
16. John Dunne
    Assistant Attorney General
    U. S. Dept. of Justice
    Washington, D.C.
17. Julian Tepper

E. *PLAINTIFFS*

The following plaintiffs, all who can be reached through the law offices of Elizabeth M. Fink, will testify concerning their experiences on September 13, 1971 and the following days of torture and brutality. They will cover the following topics:

a. the period before the assault

b. the assault itself

c. the herding into A yard through the door

d. the time in A yard including but not limited to the stripping, the crawling and the beatings

e. the failure to provide medical care to the wounded

f. the interference with medical care by the state personnel

g. the gauntlets

h. the rehousing

i. contacts with Defendants Mancusi and Pfeil

j. special cases of torture including but not limited to the table incident, the Xs, and the shotgun shells

k. the beatings in HBZ

l. the beatings in 6 company

m. the beatings in the hospital

n. the beatings in the regular cell blocks

o. the failure to provide medical care for plaintiffs who were seriously beaten

p. the beatings on September 14, 1971

q. the beatings on September 15, 1971

1. Rayfus Buster
2. Angel Villaneuva
3. Thomas Louk
4. Curtis McLaurin
5. Robert Nardiewicz

6. Akil Al-Jundi
7. Abelardo Alejandro
8. R. Justice Allen
9. Dean J. Anderson
10. Eugene D. Anderson
11. Albert Andrus
12. John Armstrong, Jr.
13. Curtis Bailey
14. David Bell
15. George Benjamin
16. David Blackwell
17. Lawrence Blair, Jr.
18. Herbert X. Blyden
19. Osborne Boalds
20. Don A. Boyd
21. Carlos Brown
22. Harvey Brown
23. Stan Brown
24. Edward Bump
25. Joseph Burton
26. Clyde Buster
27. Leon Butcher
28. Richard Campbell
29. Michael Caserta
30. Michael Cathcart
31. James Cicero
32. Richard X. Clark
33. George Colcloughley
34. Grady Coleman
35. Samuel Collier
36. Armando Colon
37. Samuel Conyers
38. Pernell Cooks
39. Harold Corley
40. Arthur Crawford
41. Jaime Cruz
42. Charles Curtis
43. Terry Dandridge
44. James Davenport
45. Cleveland Davis aka Eric (Jomo) Thompson

46. Richard Davis
47. Robert L. Davis
48. Larry DeBerry
49. Bruce Defense
50. Willie DeLeon
51. Kimanthi Dingle
52. William E. Doud
53. Roland Dow
54. Irving Doxen
55. Thomas Drake
56. Robert Edwards
57. Sabir El-Amin
58. Willie C. Elliott
59. Davis Esprinel
60. Allen Evans
61. Gregory Felder
62. Albert Fishburn
63. John Flowers
64. Perry Ford
65. Thomas H. Foreman
66. Albert Fowler
67. Antonio Franco
68. Thomas Frazier
69. L.C. Gardener
70. Kareem Garrett
71. Steven Garrett
72. Henry Gaskin
73. Kenneth Gaynor
74. Samuel Gilmore
75. Gaylord Gravitt
76. Michael Green
77. Matthew Gulley
78. Dabney Hall
79. Larry Basheer Hameed
80. William Earl Harris
81. Charles G. Hill
82. Harold Hill
83. Homer Hogan
84. Donald Holloman
85. Willie Holmes

86. Calvin Hudson
87. Raymond Jackson
88. Clifford Johnson
89. James R. Johnson
90. Wilbur Johnson
91. Harold S. Jones
92. Milton Jones
93. Richard Joyner
94. Vernon Joyner
95. Charles Kelly
96. Timothy Kelly
97. James Knox
98. Edward Kowalczyk
99. Harry Kyle
100. Tyrone Larkins
101. George Lewis
102. Maurice Lillis
103. Gordon A. Lindenmuth
104. Charles Luster
105. James P. Lynch
106. Ronald Lyons
107. Mario Armando Maldonado
108. Alfred Mancuso
109. Vernon Manning
110. Melvin Marshal
111. John Massey
112. William A. Maynard, Jr.
113. Ronald McFadden
114. Otis McGaughy
115. Emmett McKay
116. Khalieb McKinnon
117. Charles McLain
118. Stephen Merkel
119. Louis Milburn
120. William Miles
121. George E. Mitchell
122. Michael L. Mitchell
123. James Moore
124. Joseph Moreno
125. Ronald L. Morris

126. Yahya Muhammad Muntaqim
127. Harold Nance
128. Lerone Nesmith
129. Robert O. Nesmith
130. Robert Neureuter
131. James W. Nicholson
132. Donald Noble
133. Delbert William Ode
134. Robin Palmer
135. Gordon Patterson
136. Charlie Joe Hoblin
137. Ernest Pettigrew
138. Michael Phillips
139. Carlos M. Pizarro
140. Richard Pooler
141. Vincent Quagliana
142. Jose Quinones
143. Eligio Ramos
144. Oji C. Reed
145. James 33X Richie
146. Willie F. Richmond
147. Leon Rine
148. Jacques Roberts
149. Bobby Robertson
150. Thomas Robinson
151. Carlos Roche
152. Elbert Ross
153. Calvin Rucker
154. John Sadowy
155. Ray Salter
156. Robert E. Sawyer
157. Anthony Scales
158. Anthony Scott
159. Louis Scott
160. Daniel Sheppard
161. George Shorts
162. Robert L. Simmons
163. Lorenzo Skinner
164. Alfred Smith
165. James Smith

166. Phillip A. Smith
167. Raymond Smith
168. Willie Smith
169. Marion Stevenson
170. Andrew L. Stewart
171. Eugene Stoesser
172. Michael Strange
173. Quillie Stroud
174. Carl Suddith
175. Raymond Sumpter
176. Robert Tatum
177. Robert Taylor
178. Robert Travis
179. Gregory Treadwell
180. Albert Victory
181. Charles E. Walker
182. Harold Walker
183. Lloyd B. Walker
184. W. Walker
185. Samuel C. Walls
186. Stacy Washington
187. Earl Washington
188. Joseph Williams
189. Curtis Woddell
190. James Woodard
191. William S. Wooden
192. Willie Young
193. Frank Smith
194. Alfred Plummer
195. John Sampson

F. *MEDICAL PERSONNEL*

1. Michael M. Baden, M.D.
   142 East End Avenue
   New York, New York 10028

Dr. Baden will testify concerning the autopsies he performed and his contacts with the defendants, various state personnel and the prosecution.

2. Worthington Schenk M.D.
   38 Front Avenue
   Silver Creek, New York 14136

Dr. Schenk will testify concerning his contacts with Defendant Mancusi, his trip to Attica, the lack of planning for the medical care, and the subsequent medical care that was given.

3. David H. Breen M.D.
   36 Elizabeth Street
   Dansville, New York 14437

Dr. Breen will testify concerning his experiences giving and attempting to give medical care at Attica.

4. Michael Sullivan M.D.

Dr. Sullivan will testify concerning his tour of the prison on September 21, 1971 as a doctor for the Goldman Panel evaluating the injuries sustained by the plaintiffs.

5. John T. Edland M.D.
   AUN

Dr. Edland will testify concerning his experiences with the defendants and the state police as well as the autopsies he performed.

6. Dr. George Reading
   Strong Memorial Hospital
   Rochester, New York

Dr. Reading will testify about his treatment of the injured plaintiffs.

7. Gene Sellick D.V.M.
   1650 Austin Road
   Attica, New York

Dr. Sellick will testify concerning his duties at Attica, his experiences giving first aid after the assault, and his observances concerning the assault force and the medical care.

8. Robert Jenks, M.D.
AUN

Dr. Jenks will testify about his experiences treating the wounded hostages and prisoners after the assault.

9. William Major M.D.
AUN

Dr. Major will testify concerning his experiences providing medical care.

10. Norma Gleason R.N.
AUN

Nurse Gleason will testify concerning her experiences as a nurse on the prison ward at Meyer Memorial Hospital.

11. John Kabel
AUN

Mr. Kabel will testify concerning his experiences as a litter bearer and medic for the hostages and prisoners on September 13, 1971.

12. Donald Kirkwood
AUN

Mr. Kirkwood will testify concerning his experiences as a litter bearer and medic for the hostages and prisoners on September 13, 1971.

13. Theodore Papademetriou, M.D.
462 Grider St.
Buffalo, New York

Dr. Papademetriou will testify concerning the medical care he provided to the plaintiffs.

14. Allan D. DePew M.D.
    3673 Southwestern Boulevard
    Orchard Park, New York

Dr. DePew will testify concerning the medical care he provided to the plaintiffs.

15. Lois Flahive
    100 East Avenue
    Attica, New York

Nurse Flahive, the school nurse for Attica public schools, was one of the few medical personnel on hand when the assault began. She will testify concerning her experiences.

G. *NATIONAL GUARD*

1. John Cudmore M.D.
   50 High Street
   Buffalo, New York

Dr. Cudmore will testify as he did before the McKay Commission.

2. Ronald Dill
   78 Bernadette Terrace
   West Seneca, New York 14224

Mr. Dill will testify concerning his experiences as a medic in the yards after the assault was over. All of the National Guard witnesses will testify concerning the torture and brutality they witnessed that took place that day from the moment that they entered the prison until they left.

3. James B. O'Day
   122 Roberts Drive
   North Tonawanda, New York 14120

Mr. O'Day will testify concerning his experiences as a medic in the yards and the hospital after the assault was over. See the description of Mr. Dill.

4. Franklin Davenport
   1882 Old Seneca Turnpike
   Marcellus, New York

5. Kevin Burke
6. Mark Futterman
7. Salvatore San Filippo
8. Daniel Callaghan
9. Dale D. DiBernardini
10. Nicholas Liberante
11. Ronald Mikolajewski
12. Charles A. Fiorollo
13. Mark F. Emminger

For Guardsmen Nos. 5-13 above, please see description of the testimony of No. 2 (Mr. Dill).

H. *DEPARTMENT OF CORRECTIONAL SERVICES PERSONNEL WHO WERE MEMBERS OF THE ASSAULT FORCE*

1. John Vergamini
2. Warren Cairo
3. Herman Lang
4. Ronald Hiscutt
5. Nicholas DeSantis
6. Ronald Edgarton
7. Howard Holt
8. Ronald Hollander
9. Daniel Clor
10. Gary Van Allen
11. W. Brahney
12. J. Burns
13. P.J. Parisi
14. P.F. Stringham
15. C.R. Miller
16. N.E. Camp
17. J.T. Cholette
18. G.J. Crehan
19. R.J. Leland

20. W.C. Forbes
21. T. Giltner
22. Robert DeChick

I. *OTHER DEPARTMENT OF CORRECTIONAL SERVICES PERSONNEL*

1. Vincent Mancusi

2. Karl Pfeil

3. Michael Smith
Bliss, New York

Mr. Smith will testify concerning the injuries he sustained by state police fire on September 13, 1971.

4. Walter Zymowski
AUN

Mr. Zymowski will testify concerning the injuries he sustained by state police fire on September 13, 1971.

5. Robert Curtiss
AUN

Mr. Curtiss will testify concerning the injuries he sustained by state police fore on September 13, 1971.

6. Gerald Houlihan

Mr. Houlihan, the director of press relations, will be called to testify concerning his role in the events at Attica, in particular to discuss the basis of the false statement that the hostages were killed by the plaintiffs which he gave to the media on September 13, 1971.

7. Wim Van Eekeren

Mr. Van Eekeren will be called to testify concerning his role in the events at Attica.

8. Nelson F. Steinbaugh
   AUN

Mr. Steinbaugh will be called to testify concerning his role in the events at Attica.

J. *OTHER LAW ENFORCEMENT PERSONNEL*

1. Anthony Yazback
   Monroe County Deputy Sheriff
   AUN

Mr. Yazback's testimony will concern his taking photographs of the events after the retaking.

2. Judge Robert E. Fischer
   Broome County Courthouse
   Binghamton, New York 13902

Justice Fischer will concern his contacts with the defendants, his role in the Barbolini affair, and his knowledge of the reprisals.

3. William O'Connor and Other Unknown FBI agents

These agent(s) will testify concerning the FBI report concerning Attica.

4. Michael J. Amico
   AUN

Mr. Amico will testify concerning the activities of the Erie County Sheriffs as participants in the rehousing.

K. *EXPERTS*

1. Malcolm Bell
   R.F.D. 1, Box 19
   Weston, Vermont 05161

Mr. Bell will testify pursuant to Rules 701-704 and 1006 of the Federal Rules of Evidence. As a member of the Attica special prosecution team, Mr. Bell had primary responsibility for the investigation of state personnel. For many months, he analyzed all of the voluminous evidence, including but not limited to the photographs, slides, videotapes, audio tapes, supervisory personnel memos, prior testimony and multitudinous shooter statements. Given the voluminous amount of material that the jury must absorb, Mr. Bell will summarize and analyze evidence in a way which will significantly assist the trier of facts. See above, Sec. II-B-2.

2. Ballistics Expert

3. Film and Photograph Expert

This expert will testify about the preparation and alteration of the slides and videotapes.

L. *PRESS PEOPLE*

1. Fred Ferretti
   c/o Gourmet Magazine
   560 Lexington Avenue
   New York, New York 10022

Mr. Ferretti was employed by the New York Times. During the assault he kept a log which was reported in the Times the next day. He will testify concerning his contemporaneous notes concerning the assault as well as his experiences at the prison before and after the retaking.

2. John Johnson
   WABC-TV

Mr. Johnson will testify concerning his experiences as the prison before and after the retaking.

3. Chris Borgen
   WCBS-TV

Mr. Borgen will testify concerning his experiences at the prison before and after the retaking.

4. Robert Buyer
   Buffalo News

Mr. Buyer will testify concerning his experiences at the prison before and after the retaking.

IV. EXHIBITS

I. Pictorial Evidence

A. Photographs

1. Photographs of the retaking
2. Photographs of the reprisals
3. Photographs of the rehousing
4. Photographs of the prison
5. Aerial Photographs
6. Photographs of the dead on the scene
7. Photographs of the dead in the morgue
8. photographs of the dead in autopsies
9. negatives of the photographs which are damaged

These photographs, all in the possession of the Attorney General and the subject of many years of inspection by the defense except for the autopsy pictures which were taken and kept by Dr. Michael Baden, were taken by various law enforcement personnel who were present at Attica during the events in question.

B. Slides

The slides, taken by State Police Jerome O'Grady during his assignment to document the events at the prison on September 13, 1991, are in the custody of the Attorney General's office in Rochester, New York. Some of them were blown up when they

were supplemental grand jury exhibits and those are kept in the Attica Room, New York City.

C. Videotapes

The videotapes, which were taken by the state police over several days, include footage which was taken of the assault. They are in the custody of a private video company located in Batavia, New York who inconceivably purchased the raw footage from the Attorney General and then produced copies which are seriously deteriorated and almost unwatchable.

D. Charts

These charts, kept in the Attica Room, depict the various parts of Attica Prison. One chart, used in the grand jury, will be the primary chart used to point out where various events took place and the locations of the various areas.

E. News Media

All three television networks possess relevant pictorial evidence of what occurred on September 13, 1971. Once a trial date is set, subpoenas will be served upon the three networks, the three local stations in New York City, and the local televisions stations in Rochester and Buffalo, New York. Once the plaintiffs' subpoenas are returned, discovery and inspection will be arranged with the defense.

F. McKay Commission materials

The State Archivist in Albany now has custody of all the McKay records. The Attorney General and the McKay Commission staff both agree that documentary evidence that McKay was provided is not privileged. The materials includes photographs, slides, and videotapes which are, upon information and belief, in much better shape than those in the custody of the Attorney General. Arrangements are being made to restore and duplicate these videotapes and have access to the other materials. Included with these materials are audio tapes made by the state police on the days in question.

G. Television Films

The public hearings of the McKay commission were televised by public television. Copies of these hearings are in the custody of the State Archivist. Relevant testimony including but not limited to the testimony of defendants and witnesses who are not available to appear, will be offered into evidence.

H. Weapons and Ammunition

Shell casings, weapons, and spent bullets among other things are now in the possession of the Attorney General and will be offered at trial.

I. X-rays

X-rays of the wounded and deceased, some in the possession of the Attorney General, some in the possession of the McKay Commission and some in the possession of Dr. Michael Baden, will be offered.

II. Documents

A. Documents Generated by the Defendants

1. Mancusi-Monahan Command Document
2. Statements by Defendant Monahan to various state police supervisory personnel
3. Statement by Karl Pfeil
4. Grand Jury testimony of Karl Pfeil
5. Defendant Oswald's ultimatums
6. Defendant Mancusi's log
7. Defendant Mancusi's chronology
8. documents, interviews and statements generated by Defendant Oswald
9. notes taken by Defendant Monahan

B. Documents Generated by the Plaintiffs

1. the lists of the prisoners' demands

2. the Attica Liberation Faction document

3. statements of the injured and beaten plaintiffs

C. Trooper and State Police Personnel Statements

The trooper and other state police personnel statements along with the guard statements listed below, taken in September, 1971, either on September 13th or within days, all in the possession of the defense, reflect the varied law enforcement versions of what the state police did during the assault and its aftermath.

D. Statements of Correction Officers Who Participated in the Assault

E. Ballistic Reports

1. Reports prepared by the state police

a. Robert Horn documents

b. weapons accountability documents

c. ballistic reports on dead inmates and hostages

d. firearm records of individual shooters-troopers, state police personnel and guards

e. regulations concerning firearms

f. firearms instruction record

g. lists of weapons

h. receipts for individual weapons

i. telephone logs concerning weapons

j. documents about slugs not found by state police

k. weapons collection documents

2. Reports generated by other law enforcement personnel

3. Reports generated by McKay Commission

E. Medical Reports

1. death certificates of prisoners

2. death certificates of hostages

3. medical records of wounded prisoners

4. medical records of beaten inmates

5. autopsy reports of prisoners

6. autopsy reports of hostages

F. State Police Documents

1. Manuals

2. documents describing the crime scene

3. documents which are required to be completed when carrying and using firearms blank and executed

4. documents which describe the acquisition and transportation of the weapons used by the assault force

5. documents addressed to Defendant Monahan

6. documents relating to Trooper Aldo Barbolini

7. documents concerning the use of CS gas

8. logs

9. documents concerning riot control

10. documents concerning the helicopters used in the assault

11. documents concerning the message given from the helicopter

12. documents concerning the state police morgue
13. diagrams of crime seene
14. negatives of state police photos
15. photo logs
16. reports by supervisory personnel concerning their activities at Attica
17. lists
18. sketches
19. transcripts and copies of radio logs
20. command documents
21. blotter entries

G. Department of Correctional Services (DOCS) documents

1. manuals and guidebooks
2. Attica sign-in records
3. correction officers' statements concerning the 13th
4. documents generated by Walter Dunbar
5. transcripts of Van Eekeren contemporaneous tapes
6. documents concerning the correction officers sent from Auburn Prison – shooters and non shooters
7. disturbance control plans
8. documents and medical reports concerning C.O. Mike Smith, Walter Zymowski, and Robert Curtiss
9. documents concerning correction officer shooters
10. command documents

11. diagrams concerning DOCS shooters

12. relevant administrative documents

H. Documents From Other Law Enforcement Agencies

1. Documents and negatives generated from the Monroe County Sheriffs' Department

2. Documents relating to the Erie County Sheriff's Department

I. Investigatory Reports

1. McKay Report

2. Goldman Report

3. FBI report

4. Special Investigation Reports of Bernard S. Meyer and Alfred J. Scotti, together with official announcements and statements by Gov. Hugh Carey concerning these reports and official actions he took as a result of their findings.

J. Decisions

1. Jones v. State, Judge Quigley's decision

K. Documents which concern the National Guard

1. documents concerning riot control

2. statements of the National Guardsmen who were at the prison on the 13th.

V. **EXCERPTS FROM DEPOSITIONS AND OTHER PRIOR SWORN TESTIMONY**

A. Oswald

1. Grand Jury
2. McKay Commission
3. Barnes Deposition
4. Jones Testimony
5. Meyer

B. Monahan

1. McKay Commission
2. Grand Jury Testimony
3. Jones Testimony
4. Meyer

C. Dunbar

1. McKay Commission
2. Grand Jury Testimony

D. A. C. O'Hara

1. McKay Commission
2. Jones

E. John Miller

1. McKay Commission
2. Jones Testimony

F. Nelson Rockefeller

1. Barnes Deposition
2. McKay Commission

G. John Dunne

1. McKay Commission

H. Norman T. Hurd

1. McKay
2. Meyer
3. Jones

I. Frank Lott

1. *Inmates v. Rockefeller*, 9/30/71

J. Roger Champen

1. *Inmates v. Rockefeller*, 9/30/71

K. John Edland. M.D.

1. *People v. Stroble*, defense witness

L. Jim Ingram

1 *People v. Stroble*, defense witness

M. Wim Van Eekeren

1. Grand Jury

N. Tim Swift

1. McKay

O. GI Paris

1. McKay

P. Gerald T. Houlihan

1. grand jury

VI. SPECIAL DAMAGES

Plaintiffs make no submission concerning special damages at this time, in light of the Court's orders certifying the plaintiff class and bifurcating the trial, since questions of damages must abide a finding of liability against defendants and determination of the appropriate class-wide methods for establishing damages.

Respectfully submitted,

DATED: April 30, 1991

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Attorneys for Plaintiffs

75-132
Akil Al-Jundi et al. v. Nelson A. Rockefeller et al.

DATE	NR.	PROCEEDINGS
1975		
Apr. 9	1.	Filed original papers, docket sheet & certified copy of order transferring the action of USDC So. Dist. of N.Y.
9		JS 5 made
21	2.	Filed stipulation that pltfs. time to move for a designation of a class action & defts. time to answer or move are extended until 4-21-75.
Aug. 1	3.	Filed stipulation extending time for defts.' to answer to 8-15-75 etc.
4		Ret. of order to show cause. Adj. to 8-11-75 with approval of the Ct. F-167
13	4.	Filed order that all parties & their counsel are forbidden to communicate with any potential or actual member of the putative class who is not a formal party to the action, etc.-Elfvin, DJ Notice & copies to Daniel Meyers and George Mantzoros
11		Counsel to file & serve motions as to the personal jurisdiction & as to the class action aspects ret. 9-8-75. Answering affdiavits by 9-15-75 & all motions relative to same are to be ret. 9-19-75 at 11:00 am
Sept. 5		Issued summons and one (1) copy.
10	5.	Filed order denying service on deft., Nelson Rockefeller by F-168 certain authorized people.-Elfvin, DJ Notice & copies to Thomas Burke & Louis J. Lefkowitz

1975

Sept. 11	6.	Filed amended complaint.
11	7.	Filed Pltfs. notice of motion for order declaring that this action be maintained as a class action etc. ret. 9-19-75.
12	8.	Filed Defts. notice of motion for an order dismissing the complaint etc. ret. 9-19-75
15	9.	Filed pltfs. affidavit in opposition to defts. motion to dismiss.
16	10.	Filed Mar. ret. on S&C served on Russell Oswald on 9-10-75.
16	11.	Filed Pltfs. proof of service of affidavit.
16		Issued susmmons and 2 copies of amended complaint.
17	12.	Filed Defts. affdiavit in opposition to pltfs. motion to declare this action a class action.
19	13.	Filed Defts. notice of motion to dismiss amended complaint ret. 9-19-75
19		oral argument on motion for class certification, decision reserved
23	14.	Filed transcript of proceedings of 8-11-75
Oct. 1	15.	Filed Mar. ret. on amended complaint unserved on Leon Vincent and served on Major Gen. John C. Baker on 9-26-75
14	16.	Filed Deft., Baker notice of motion to dismiss summons & amended complaint & in opposition to pltfs. motion for class action ret. 11-3-75.— adj. generally

1975

Nov. 25	17.	Filed Pltfs. interrogatories (set 1)
28	18.	Filed defts. notice of motion for protective order etc. ret. 12-8-75
Dec. 15	19.	Filed pltfs. affdiavit in opposition to defts' motion for a protective order.
19	20.	Filed Defts. reply affidavit in support of motions to vacate interrogatories and to stay pre-trial discovery pending disposition of Rule 12(b) motions.
22		Ret. of motion. Submitted on papers.

1976

Aug. 30		Case call on motion of Ct. to coordinate discovery. Atty. Eric L. Glazer noted to the Ct. that prisoners legal assistance project is without funds, and he is only observing. After discussion the Ct. noted that the real problem is deposing same person in case after case, the Ct. will confer with Judge Curtin and also Judge Quigley in the Ct. of claims.
Sept. 20	21.	Filed transcript of proceedings of 8-30-76 (in Civ-1971-410)

1977

March 9	22.	Filed Defts. affdiavit re John C. Miller & Walter Dunbar

1979

Oct 31	23.	Filed decision & order of Judge Elfvin filed 10/31/79 consisting of 48 pgs. Notice & copies to Thomas Burke, Esq. and George C. Mantzoros, Asst. Atty. Gen. F-217
Nov 13	24.	Filed affidavit of John R. Stewart on behalf of Deft. Nelson A. Rockefeller.

1979

Dec. 3	25.	Filed Pltfs'. Notice of Appeal (copy mailed to Mr. Mantzoros and Clerk, CCA with copy of docket entries; CCA's Forms C and D mailed to Mr. Cantor)
5	26.	Filed Stipulation & Order extending time to answer amended complaint, to March 15, 1980, etc. Mailed notices.
Dec 19	27.	Filed deft Notice of Motion For substitution of counsel, ret 12/27/79.
20	28.	Filed Affidavit in response to notice of motion for substitution of of counsel.
20	29.	Filed notarized statement of Helen O. Kern, stated she served Affidavit in response to Notice of motion for sub. of counsel on Dept. of Law, State of N.Y., Att'y Gen'l Office, The Capitol, Albany, N.Y., att'n: of John R. Stewart, Esq. Assist. Atty Genl by depositing a true copy of same in official depository on 12/19/79.
		Mailed letter to John R. Stewart/w/copies to 35 names listed on motion (ret, 12/27/79) confirming tele conv. w/John Whitlock, changing ret date to 1/7/80, 11:00 a.m.

1980

Jan 3	30.	Filed John Stewart, Assist. Atty Gen'l consent to substitute attys.
4	31.	Filed James B. Ayers, Affidavit in opposition to motion for substitution of counsel.
7	32.	Filed affidavit, of Michael A. Gurda as attorney for John Monahan (taking place of Atty Gen'l, who is w/drawing).
7	33.	Filed affidavit, substituting Bernard J. Malone, Jr. (Hinmar, Straub, Pigors, Manning) as atty. for P.P. Zielinski.

1980

Jan. 7		Court noted that only seven defts. remain for NYS to withdraw as counsel and Atty. Steward will furnish packets re reimbursement of private attys. by NYS. Court heard argument by Defts. that reimbursement is the problem and court takes under advisement.
15	34.	Filed Consent to change attorney: Thomas M. Whalen of Cooper, Erving & Savage, will represent John C. Baker.
15	35.	Filed Order & Affirmation in support of order substituting a private process server for the U.S. Marshal, to serve executors of the estate of Nelson A. Rockefeller Notices of Motion requesting that the aforesaid estate be substituted as a defendant herein.-Elfvin, D.J. Notices mailed. F-220
24	36.	Filed Consent to Change Atty: Irving C. Maghran, Jr, of Maghran, McCarthy & Flynn of 1016 Ellicott Sq. Bldg., Bflo, N.Y., will act as atty for Karl Pfeil, taking place of Asst. Atty Gen'l.
28	37.	Filed cert. cy. of Order of CCA dismissing the appeal for failure to comply with the Civil Appeals Management Plan of the Court of Appeals
31	38.	Filed Deft's Affdiavit stating he is atty for Leon Vincent & request that the instant application of the Atty. General for w/drawal be w/held pending a hearing and submission by the Atty. General of his proposed program to implement his wi/drawal to provide for the matters requested by Mr. Fischer, dated 12/28/79.
Feb 4	39.	Filed Pltf's Notice of Motion To Compel Substitution, etc & Affidavit in support of motion, ret 2/11/80.

1980

Feb. 11		Court was advised of Pltf's reauest to adjourn motion to compel substitution of deft. Nelson Rockefeller to 2/25/80. Court approves the adjournment.
19	40.	Filed Consent to change attorney to Damon, Morey, Sawyer & Moot, 1800 Liberty Bank Bldg., Buffalo, N.Y. 14202.
22	41.	Filed Defts' Notice of Motion dismissing action against deft Nelson A. Rockefeller, w/support affidavit, ret 3/4/80.
22	42.	Filed Affidavit of Service by Joyce Miller, stating the service of Notice of Motion to Compel Substitution, etc by depositing same enclosed in a post-paid properly addressed wrapper in an official depository under the care and custody of the U.S. Postal Service within the State of N.Y.
27	43.	Filed Deft's Notice of Motion w/affidavit in support of motion, 3/5/80
25		Ct was advised that pltf's motion to compel substitution was adj to 4:00PM on 3/5/80.
29	44.	Filed Affidavit in Opposition to Defts' Motion to Dismiss Against Deft Nelson A. Rockefeller.
Mar 3	45.	Filed defts' Affidavit in opposition to motion to compel substitution.
6	46.	Filed Asst. Atty General John R. Stewart's Reply Affidavit.
6		Atty Leonard Klaif moves the Pro Hac Vice for Atty. Robert I. Cantor, the ct grants the motion. Ct. Will hold in abeyance the motion to compel substitution, and motion to dismiss and direct

1980

pltf to serve the executor of the Estate of Nelson Rockefeller and advise the ct by letter. Recorded on tape. Ct. Time 4:03PM to 4:32P.M..

Mar. 10 47. Filed deft, John C. Baker's Answer To Amended Complaint.

14 47a. Filed consent that Jaeckle, Fleischman sub as atty or Oswald/

17 48. Filed deft's Vincent Mancusi, Answer to Amended Complaint.

17 49. Filed deft's Russell G. Oswald Answer to the amended complaint, with certificate of service attached.

17 50. Filed Amended Answer of deft, John Monahan, w/affidavit attached.

24 51. Filed Affidavit of service of Notice of Motion To Compel, etc and accompanying affidavit of Robert Cantor, served on Edith Phillips, etc.

25 52. Filed defts' John Monahan amended answers, w/certificate of service attached.

27 53. Filed 7 page Memorandum & Order pur to this action.-Elfvin, D.J. Notices mailed to Meyers, Esq; Cantor, Esq; Abrams, Atty Gen; Gurda, Esq; Malone, Esq; Whalen, III, Esq; Maghran, Esq; Damon, Morey, etc; Jaeckle, Fleischmann, Mugel; + 30 defts as listed on Notice of Motion for sub. of counsel. F-222

27 54. Filed Judgment on decision by the court.-Clerk. Notices as above F-22

31 55. Filed Deft Karl Pfeil, verified Answer, w/attached affidavit of Karl Pfeil. Notices mailed to attys (see list attached).

1980

Apr 4	56.	Filed defts' Vincent Mancusi's amended answer to amended comcplaint, w/certification & affirmation of service attached.
14		Motion by deft Fishcher to dismiss adj on consent and with approval of the court to 2 p.m. on 4/21/80.
18	57.	Filed deft' John C. Baker Amended Answer to Amended Complaint. Notices to attys.
18	58.	Filed deft, John C. Baker's interrogatories.
18	59.	Filed affidavit of Thomas Whalen, III requesting pltf's application for a stay of all proceedings for a period of 90 days be denied.
18	60.	Filed David Flierl, Asst. Atty General Affidavit in opposition to Motion For a Stay.
18	61.	Filed Brian Fitzgerald, Esq., Affidavit in opposition to pltf's Motion For Order Staying Deadlines, w/certificate of service.
21	62.	Filed Pltf's Notice of Motion for an order staying for 90 days all deadlines, etc., w/affidavit of Robert Cantor, Esq, attached support of motion.
21	63.	Filed Affidavit of David Calverley, Esq, in opposition to a motion by pltfs to extend their time to replead certain allegations in their amended complaint.
21		Crt declines to rule on representation at this time, Crt rules that Atty Robert Cantor is still atty for all plts on the Class Action, and directs that Atty Cantor move for discovery by deposition noticing and interrogatories by 60 days frm this date. Recorded on tape.

1980

Apr. 28	64.	Filed Memorandum & Order dismissing action against defendant Robert F. Fischer.-Elfvin, D.J. Notices to all attys. F-223
28	65.	Filed Judgment on decision by the court.-Clerk Notices sent. F-223
June 17	66.	Filed transript of proceedings held before Judge Elfvin taken on 4/21/80.
July 9	67.	Filed order to show cause directing that Pltfs are ordered to appear on 8/4/80 to show cause, if any, why this action should not be dismissed for failure to prosecute, failure to have filed interrogatories, request to produce and/or notices of depositions no later that 6/20/80, such date being 60 days from order in open court 4/21/80.-Elfvin, DJ. Notice & Copies to Messrs. Meyers, Cantor, abrams, Gurda, Malone, Whalen, Maghran, Damon, Morey, Sawyer & Moot, Jaeckle, Fleischmann & Mugel and Jackson. F-226
Aug. 4		Court heard argument on Pltf. OTSC why case should not be dismissed, decision reserved, recorded on tape 125, trak 4.
25	68.	Filed Deft. John C. Baker's affidavit of Jo-Ann Otto.
25	69.	Filed Deft. John C. Baker's notice of motion to prohibit Pltfs from introducing matters into evidence and for summary judgment ret. 9/8/80.
Sept. 12	70.	Filed Deft. John C. Bakers affidavit of Anne K. Wheeler.
Oct. 20	71.	Filed order directing that Deft. Baker's motion for summary judgment is in all respects granted

1980		and the complaint is dismissed against Deft. Baker; Pltf are prohibited from introducing all those matters in evidence which were designated in Deft. Baker's interrogatories.-Elfvin, DJ. Notices to all counsel. F-229
Oct. 20	72.	Filed judgment on decision by the court.-Clerk. Notice & Copies to all counsel. F-229
20		Court heard argument on behalf of Deft. Baker on motion for summary judgment. Court signed order.
27	73.	Filed Deft. John Monahan's notice of motion for an orer prohibiting the publication of the report of Judge Bernard Meyer, prepared in October of 1975, entitled "Final Report – Special Attica Investigation" etc. ret. 11/10/80.
27	74.	Filed memorandum and order granting Pltf's motion to substitute Estate of NARockefeller in his place & Denied Rockefeller's motion to dismiss (motion now mooted). Class certification granted in M&O dated 10/30/79 is hereby revoked; such revocation does not restart the running of the statute of limitations as to any unnamed members of Pltf. class. This case dismissed for failure to prosecute and to obey court's express orders, unless Pltfs have appointed new counsel and said new counsel has obtained court's permission to his or their substitution in place and stead of Atty. Cantor within 90 days of the entry of this order.-Elfvin, DJ. Notice & Copies to all counsel.
31	75.	Field Deft. John Monahan's interrogatories.
Nov. 10		Deft. Monahan's motion for an order to prohibit publication of report of Judge Meyer, adjourned for briefing to 12/15/80.

1980

Nov. 12 76. Filed Larry DeBarry's motion to be included as a Pltf. as an inmate of attica.

21 77. Filed order directing that memorandum and order entered 10/27/80 be amended as follows: "For theses same reasons, it is hereby ordered that this action is dismissed for failure to prosecute unless Pltfs shall hace commenced discovery, as directed by order of 4/21/80, within 120 days of the entry of this memorandum and order.-Elfvin, DJ. Notice & Copies to all counsel. F-230

Dec. 12 78. Filed John H. Murray a/k/a Yahya D. Salaam's petition to intervene as a Pltf.

12 79. Filed J. C. Gardner's petition to intervene as a Pltf.

15 80. Filed Deft. John Monahan's request to withdraw Deft. Gurda's motion etc.

1981

Feb. 24 81. Filed Pltf. Akil Al-Jundi's affidavit substitution of counsel.

24 82. Filed Pltf. Akil Al-Jundi's affidavit of David L. Meyers (Consent to substitution of counsel.

24 83. Filed Pltfs' notice to take deposition of A. C. O'Hara to be taken on 10/29/81.

24 84. Filed Pltfs' notice to take deposition of Karl Pfeil to be taken on 12/12/81.

24 85. Filed Pltf's notice to take deposition of Vincent Mancusi to be taken on 10/1/81.

24 86. Filed Pltf's notice to take deposition to Russell A. Oswald to be taken on 9/17/81.

1981

Feb. 24 87. Filed Pltf's notice to take deposition of Executors of the Estate of Nelson A. Rockefeller to be taken on 9/10/81.

Feb. 24 88. Filed Pltfs' notice to take deposition of John Monahan to be taken on 10/15/81.

24 89. Filed Pltfs' notice to take deposition of the Custodian of Records of the New York State Department of Correctional Services to be taken on 5/21/81.

24 90. Filed Pltf's notice to take deposition of Edward Weldon to be taken on 4/30/81.

24 91. Filed Pltf's notice to take deposition of the Custodian of Records of the office of the Governor of the State of New York to be taken on 5/14/81.

24 92. Filed Pltfs' notice to take deposition of the Custodian of Records of the office of Attorney General of the State of New York to be taken on 4/30/81.

24 93. Filed Pltfs' notice to take deposition of the Custodian of Records, National Guard of the State of New York to be taken on 6/5/81.

24 94. Filed Pltfs' notice to take deposition of the Custodian of Records of the New York State Police to be taken on 5/28/81.

24 95. Filed Pltfs' request for admission of facts.

27 96. Filed order and affidavit (consent to substitution of counsel) directing that Daneil L. Meyers consents to Elizabeth Fink and Susan Carpenter to be substituted as attorneys for Pltfs.-Elfvin, DJ. Notice & Copies to all counsel. F-233

1981

Mar. 25	97.	Filed Deft. Russell Oswald's notice of motion for an order striking the purported substitution of Pltfs' counsel, vacating the order of this court dated 2/24/81 etc. ret. 4/6/81.
25	98.	Field Deft. Estate of Rockefeller's notice of motion for an order striking the purported substitution of pltfs' counsel, vacating this court's order of 2/24/81 etc. ret. 4/6/81.
26	99.	Filed Deft. Karl Pfeil's notice of motion for an order striking the purported substitution of Pltfs' counsel; to vacate the court's order of 2/24/81 etc. ret. 4/6/81.
26	100.	Filed Deft. Vincent Mancusi's notice of motion and supporting affidavit for an order striking the purported substitution of Pltfs' counsel etc. ret. 4/6/81.
Apr. 3	101.	Filed Pltfs affidavit of Susan E. Carpenter as local counsel for Pltfs.
3	102.	Filed Pltfs affidavit of Elizabeth M. Fink in opposition.
6	103.	Filed Deft. John Monahan's notice of motion and supporting affidavit for an order striking the purported substitution of Pltfs' counsel etc. ret. 4/6/81.
6	104.	Filed Pltfs affidavit of Martin R. Stolar in opposition to motion to dismiss.
6		Court heard argument on motions to strike substitution of counsel and to dismiss. Recorded on tape 153, trak one. Court directs Pltf. to obtain consents from individual Pltfs for substitution of counsel so as to effect such substitution

1981		as quickly as possible, court will hold any matters on discovery. Court has reserved decision on motion to strike such substitution.
Apr. 20	105.	Filed Defts notice of motion for protective order ret/ 5/11/81.
24	106.	Filed deft Monahan's notice of motion for protective order ret. 5/11/81 w/attached affidavit.
27	107.	Filed Transcript proceedings of motion held before Judge Elfvin on 4/6/81.
May 1	108.	Filed certificate of service of Polly Eustis.
11		Motions by state of new york and Deft. Monahan for protective order adjourned on consent to 6/1/81.
15	109.	Filed memorandum and order directing that Al-Jundi, Smith, Plummer, Blyden, Little, Palmer, Nieves, Crowley, Hudson, M'Pingo, Stokes, Sekou and Rosenbergs motions are denied; permission is hereby given for Pltfs' Smith and Rosenberg to proceed pro se; Fink is hereby substituted for Meyers as counsel for above mentioned Pltfs; the claims of Murphy, Louk, Butler, Maynard, Omowali, Lafranque, Sheilds, Ross, Lott, Haynes, Sumpter, Toure and Dacajeweiah are dismissed for failure to prosecute except for the claims of each of these persons for whom there shall have been filed within 30 days of this memo and order a written form in which he personally consents to the substitution as his counsel herein etc.-Elfvin, DJ. Notice & Copies to all counsel. F-236
June 2	110.	Filed Pltfs notice of motion and affidavit in support and in opposition to protective order ret. 6/15/81.

1981

June 1		Motion by NY state and Deft. Monahan for a protective order, adjourned on consent to 11:00AM 6/15/81.
12	111.	Field Deft. State of New York's affidavit of John R. Stewart in opposition to the cross-motion of the Pltfs.
15	112.	Filed affidavit of substitution of counsel.
15	113.	Filed consent to change attorney directing that Elizabeth Fink and Susan Carpenter are substituted at attorneys for Pltf. Peter Butler instead and in place of Daniel Myers and Robert Cantor.
15		Court heard argument on motion for protective order, and state will make available the material in the 314 file drawers to appropriate designated individuals for Pltf. and disputed items will be brought to the attention of the court for decision. Court notes to Pltf. that inventory need not be furnished. Recorded on tape 160, trak 3.
24	114.	Filed Deft. John Monahan's affidavit of Robert N. Isseks in opposition to the cross motion of the Pltf.
July 2	115.	Filed order directing that this action proceed with certain Pltfs, included in this order is the list of attorneys for said Pltfs.-Elfvin, DJ. Notice & Copies to all counsel.
9	116.	Filed Deft. Monahan's affidavit of service by mail — served on William Jackson and Jaeckle, Fleischmann & Mugel on 7/6/81.
Aug. 6	117.	Filed order directing that Deft's time in which to respond to Pltfs' notices of deposition and

1981

request for admission of facts is extended to 8/31/81.-Elfvin, DJ. Notice & Copies to all counsel

10 118. Filed Deft., Russell G. Oswald, notice of motion for a protective order striking & vacating the discovery notices etc.ret. 8-24-81. F-239

14 119. Filed Deft., Karl Pfeil notice of motion for a protective order ret. 8-24-81.

Aug. 14 120. Filed Deft., Vincent Mancusi notice of motion & supporting affidavit for protective order ret. 8-31-81.

18 121. Filed Deft. The Estate of Nelson A. Rockefeller's notice of motion for a protective order vacating Pltfs' notice of deposition and request for admission of facts etc. ret. 9/14/81.

24 122. Filed Deft. John Monahan's notice of motion for protective order ret. 8/31/81.

Sept. 10 123. Filed Pltfs affidavit of Elizabeth M. Fink in opposition to Defts' motion for a protective order.

14 Ct reviewed discovery on motions for protective order. Ct is advised that records at World Trade Center still to be reviewed. Interrogatories to be submitted to trustees of estate of Rockefeller. Ct to inquire of records sealed in a courtroom at Rochester, N.Y. Recorded on tape 177.

Oct. 9 124. Filed Memorandum & Order denying defts motions for protective orders; further ordering that movants serve answers to the admission requests in accordance w.this opinion & w/the clear requirements of Fed. R. Civ. Procedure, rule 36, etc.; it is further ordered that movants shall have 30 days frm the filing of this order to serve their

1981		answers. All parties are advised that the use at trial of admissions obtained in this action remains subject to all pertinent objections to admissibility which may be interposed at trial., etc.-Elfvin, DJ. Notices & cy to all attys & pltfs listed on attys sheet. F-241
Nov 6	125.	Filed Deft's answers to request for admissions.
9	126.	Filed Deft, Russel G. Oswald's response to pltfs' 1st request for admissions, w/certificate of service.
9	127.	Filed Deft. Vincent R. Mancusi's responses to pltfs' 1st request for admissions, w/certificate of service.
12	128.	Filed Laurance Rockefeller, J. Richardson Dilworth & Donal D. O'Brien Executors of Estate of Nelson Reockefeller response to pltfs' 1st request for admissions, w/affidavit of service.
20	129.	Filed Deft, Honohan admission pur to request/w affidavit of service.
1982		
Jan 8	130.	Filed Larry DeBerry Notice to Intervene as a pltf.
Mar 15	131.	Filed Transcript Proceedings of Motion held before Judge Elfvin, 6/15/81.
Apr 19	132.	Filed Elizabeth Fink, Esq's Notice of Motion for award of expenses & attys' fees, w/attached supporting affidavit, ret 5/3/82.
May 10		Pltf's motion for an order to compel discovery and for an award of attys' fees adj to 6/7/82.
Jun 7		Ct. heard argument on pltf's motion for an order to compel discovery and pltf to submit an order to the court. Recorded on tape.

1982

June 25 133 Filed Order granting pltfs' motion to inspect any and all materials, material & relevant to this action, etc...ordered that counsel for pltfs may apply to the court for an award frm the Atty Gen of the State of N.Y. for the costs, fees & expenses incurred by them by reason of the earlier failure of the Atty Gen to cooperate w/the discovery and inspection ordered by this ct and by reason of the motion to compel such discovery and inspection necessitated by the Atty Gen's failure to so cooperate.-Elfvin, DJ. Notice & cy to all attys & plts F-249

Sep 16 134 Filed Motion of Armando Colon to intervene as a pltf, w/certificate of service (no ret date).

Dec 1 135 Filed Transcript Proceedings of Motion held 6/7/82.

1983

Jan 20 136 Filed Order, Consent and Stipulation to substitution of attys that the firm of Moot & Sprague, Richard E, Moot, of counsel be substituted in the place & stead of Damon, Morey, Sawyer & Moot as attys or Vincent R. Mancusi, one of the defts in this case. Elfvin, DJ. Notice & cys to Richard E. Moot, Esq; & Damon, Morey, Sawyer & Moot. F-256

Feb 14 137 Filed affidavit of Joe Louis Howard to intervene as pltf.

1984

Aug. 16 138 Filed Larry Basheer Hameed's Motion To Intervene as a Pltf.

30 139 Filed Larry DeBerry's Motion to Joinder Needed for Just Adjudication

1984

Oct 15	140	Filed defts' Notice of Motion & Affidavits. Ret 11/5/84 at 11:00?
22	141	Filed Affidavit of Mary Jo Ben (atty for Mancusi) stating they never received a copy of Debarry's & Barnes' Motion to Intervene.
26	142	Filed Tyrone Larkins' Motion to Intervene as a plaintiff.
29	143	Filed Elizabeth Fink's Affirmation in Support of Hameed's & DeBerry's Motions to Intervene.
Nov 1	144	Filed affidavit of John Stewart (atty for deft Monahan) in support of motion for a protective order.
5		Court holds petrs DeBerry, Barnes & Larkins motions to intervene in abeyance pending pltfs' motion to recertify class & directs said motion to be filed not later than 11/19/84 & directs said motion to be filed not later than 11/19/84 & directs oral argument on 12/10/84 at 11 a.m. which is the adjourned time for argument on deft A/G's motion for a protective order.
23	145	Filed Elizabeth Fink's (atty for pltfs) Notice of Motion. Ret 12/10/84 at 11:00 p.m.
Dec 4	146	Filed deft Mancusi's Motion for an order providing for joint discovery, inspection & copying of documents & adjournment of class recertification & Affidavit in support of motion & Certificate of Service.
5	147	Filed Affidavit of Service of deft Estate of Rockefeller's Memorandum of Law.

1984

Dec. 10		Court hears oral argument as to deft A/G's motion for protective order. Atty Richard Moot to submit proposed order for court approval. Pltf's atty Fink's motion to recertify class action to be held in abeyance pending further submission of affidavits by pltf atty & then the matter will be submitted, same status for all remaining motions.

1985

Feb 27	148	Filed pltfs' Affidavits in support of their motion to prosecute this lawsuit as a class action.
June 25	149	Filed order granting pltfs' motion for recertification of the class; denying the N.Y.S. Attorney General's motion for a protective order w/o prejudice insofar as it seeks to prevent disclosure of documents under the work products doctrine but is granted insofar as it seeks to prevent disclosure of grand jury records & testimony not already made public by court order & as to Volumes II & III of the Meyer Report & as to records of the McKay Commission w/o prejudice to subsequent motions by pltfs, etc.—Elfvin, DJ. Notice & copy to all parties. Docketed 6/25/85. F-285
Aug 5	150	Filed Stipulation & Order Governing Inspection, Numbering & Copying of Attica Documents, etc.—Elfvin, DJ. Notice & copy to all parties. docketed 8/5/85. F-287
14	151	Filed deft The Estate of Nelson A. Rockefeller's First Set of Interrogatories.
14	152	Filed deft The Estate of Nelson A. Rockefeller's First Request for the Production of Documents.
28	153	Filed deft The Estate of Nelson A. Rockefeller's Notice to Take Deposition Upon Oral Examination of pltfs on 9/10/85 & 9/11/85.

1985

Aug. 30	154	Filed deft Monahan's Notice to Take Deposition Upon Oral Deposition of pltfs Al-Jundi, Smith on 9/9/85 & 9/10/85.
Oct 3	155	Filed deft Monahan's Notice to Take Deposition Upon Oral Examination of Lundy, Hicks, Durham, McNeil, Santos & Barkley.
21	156	Filed deft Monahan's 1st Set of Interrogatories to Elizabeth Durham.
21	157	Filed Deft Monahan's 1st Set of Interrogatories to Alice McNeil.
21	158	Filed Deft Monahan's 1st Set of Interrogatories to Laverne Barkley.
21	159	Filed Deft Monahan's 1st Set of Interrogatories to Maria Santos.
21	160	Filed Deft Monahan's 1st Set of Interrogatories to Litho Lundy.
21	161	Filed Deft Monahan's 1st Set of Interrogatories to Theresa Hicks.
21	162	Filed Deft Monahan's 1st Set of Interrogatories to Brenda West.
21	163	Filed Deft Monahan's 1st Set of Interrogatories to Sarah Gray.
24	164	Filed deft Mancusi's Notice of Motion for An Order Extending Time in Which to Examine Attica Documents & Declaration in support of Motion, Ret 11/4/85.
Nov 4	165	Filed Deft Monahan's First Set of Interrogatories.

1985

Nov. 12	166	Filed additional declaration of Richard E. Moot in support of motion to extend the time for copying attica documents for an additional 120 days.
15	167	Filed Pltfs' notice of motion for an order denying deft Mancusi's motion of 10-24-85 & affidavit (ret 12-13-85)
18	168	Filed declaration of John Stuart in support of motion by vincent Mancusi for an order extending time in which to examine Attica documents
18		Court adjourns deft Mancuso's motion to extend time to examine documents to 12-13-85 at 4 p.m.
27	169	Filed Deft Monahan's first set of interrogatories
27	170	Filed Deft Monahan's notice to take deposition of pltfs Omowale and LaFranque on 1-6-86 and 1-8-66
Nov 27	171	Filed Deft Monahan's notice to take deposition of Brenda West 1-15-86 and Sarah Gray 1-13-86
27	172	Filed Deft Monahan's notice to take deposition of pltfs Alfred Plummer 1-27-86 and Herbert Blyden 1-29-86
27	173	Filed Deft Monahan's notice to take deposition of Romelia Prince 1-20-86 and Johnnie Barnes 1-22-86
Dec 9	174	Filed Deft Monahan's notice to take deposition of Robin Palmer Robin Palmer 2-17-85; George "Che" Nieves 2-18-85; James B. "Red" Murphy 2-19-85; Thomas Louk 2-20-85; Peter Butler 2-21-85

1985

Dec. 9	175	Filed Deft. Monahan's notice to take deposition of Charles "Flip" Crowley 2-24-85; William A. Maynard 2-25-85; Calvin Hudson 2-26-85; Kimanthi-Mpingo 2-27-85; Ken-Du 2-28-85
9	176	Filed Deft. Monahan's notice to take deposition of Chris Reed 2-3-85; Phillip Shields 2-4-85; Jerome Rosenberg 2-5-85; Alphonso Ross 2-6-85; Gary Richard Haynes 2-7-85;
9	177	Filed Deft. Monahan's notice to take deposition of Raymond Sumpter 2-10-85; Otis McGaughey 2-11-85; Frank Lott 2-12-85; Jhn Hill 2-13-85; Joseph Little 2-14-85
24	178	Filed notice of motion by deft Vincent R. Mancusi to extend dthe time in which to examine the "Main Room" Attica documents RET 1/31/86
24	179	Filed Deft John Monahan's first set of interrogatories on Herbert X. Blyden
24	180	Filed Deft John Monahan's first set of interrogatories on Jomo Joka Omowale
24	181	Filed Deft John Monahan's first set of interrogatories on John Hill
24	182	Filed Deft John Monahan's first set of interrogatories on Vernon LaFranque
24	183	Filed Deft John Monahan's first set of interrogatories on Alfred Plummer

1986

Jan 13	184	Filed Deft. Estate of Nelson Rockefeller's notice of cross motion, and affidavit (ret 1-31-86)
13	185	Filed the Attorney General's notice of motion for an order pursuant to FRCP, Rule 26, and affidavit (ret 1-31-86)

1986

Jan. 13	186	Filed Deft. Monahan's affidavit in opposition
14	187	Filed motion of Deft. Mancusi to dismiss certain causes of action & other relief
30	188	Filed Deft., John Monahan, supplemental affidavit in opposition to pltfs. motion ret. 1-31-86
Feb. 12	189	Filed Additional Affidavit of Theresa Smyth in support of motion to dismiss, with cert. of service.
14	190	Filed Deft., John Monahan's 1st set of interrogatories to pltf., Robin Palmer
14	191	Filed deft., John Monahan's 1st set of interrogatories to pltf., Joseph Little.
24	192	Filed pltfs'. opposition to deft., Mancusi's ;motion to dismiss certain causes of action & to decertify class as to reprisal claims.
24	193	Filed Pltfs'. affirmation of service by mail.
Feb. 27	194	Filed Deft, Estate of Rockefeller reply affidavit
28		Ct. commences a hearing. Oral argument of omnibus pending pre-trial motions as follows: 1. defts. motion to decertify, etc. the matter submitted. 2.) deft. State of N.Y. motion for protective order, the matter is submitted. 3) Defts. motion for extension of time to inspect Doc's etc., the matter is submitted. 4) Pltf. motion for protective order re: discovery requests, the matter submitted. 5) deft. Esate, etc. cross motion to compel discovery, the matter is moot. 6) Pltf. motion for a scheduling order, is denied w/o prejudice. 7) Defts. cross motion for a scheduling order is also denied w/o prejudice. 8) Motion to dismiss the claim as to deft. Mancusi, the matter is submitted.

1986

Mar. 17	195	Filed Deft., John Monahan's 1st set of interrogatories to pltf. James B. "Red" Murphy
17	196	Filed deft., John Monahan's 1st set of interrogatories to pltf. George "Che" Nieves
17	197	Filed deft., John Monahan's 1st set of interrogatories to pltf. Peter Butler
17	198	Filed deft., John Monahan's 1st set of interrogatories to pltf. Thomas Louk
Apr. 21	199	Filed order that the parties shall have 135 days from this order to complete their inspection, numbering & copying of all documents presently contained in Room 4502 & the Main document or Attica Room-Elfvin, DJ Notice & copies to all parties (dkt'd. 4-21-86) F-295
May 23	200	Filed pltf's. motion for an order determining the course of proceedings etc.
27	201	Filed deft Monahan's first set of interrogatories to Kendu Haiku
27	202	Filed deft Monahan's first set of interrogatories to Oji Kwesi Seko
27	203	Filed deft Monahan's first set of interrogatories to Philip Shields
27	204	Filed deft Monahan's first set of interrogatories to Jerome Rosenberg
27	205	Filed deft Monahan's first set of interrogatories to Alphonso Ross
27	206	Filed deft Monahan's first set of interrogatories to Raymond Sumpter

1986

May 27	207	Filed deft Monahan's first set of interrogatories to Frank Lott
27	208	Filed deft Monahan's first set of interrogatories to Gary Haynes
27	209	Filed deft Monahan's first set of interrogatories to Omar Sekou Toure
29	210	Filed deft Monahan's first set of interrogatories to Frank Smith
29	211	Filed deft Monahan's first set of interrogatories to Al-Jundi
29	212	Filed deft Monahan's first set of interrogatories to William Maynard, Jr.
29	213	Filed deft Monahan's first set of interrogatories to Charles Crowle
29	214	Filed deft Monahan's first set of interrogatories to Calvin Hudson
29	215	Filed deft Monahan's first set of interrogatories to Edward Dingle
June 20	216	Filed John Stewart's (atty for Monahan) affirmation in opposition to pltfs' motion for bifurcation
20	217	Filed Affidavit of Irving Maghran (atty for Pfeil)
20	218	Filed affidavit of John Maloney (atty for Rockefeller)
20	219	Filed declaration of Richard Moot in opposition to pltfs' scheduling request
June 30	220	Filed deft Monahan's notice of motion to compel pltf Hill to to respond to the interrogatories, etc. (ret 7-14-86)

1986

June 30		The court adjourns pltf's motion for order determining course of proceedings until 7-28-86 at 4 p.m.
July 3	221	Filed deft Monahan's notice of motion pursuant to Rule 37 and Rule 6 of the F.R.C.P. w/attached affidavit (ret 8-4-86)
9	222	Filed deft Monahan's first set of interrogatories to Emanuel Johnson
9	223	Filed deft Monahan's first set of interrogatories to William B. McKinney
9	224	Filed deft Monahan's first set of interrogatories to Robert J. Henigan
9	225	Filed deft Monhana's first set of interrogatories to Bernard Day
9	226	Filed deft Monahan's first set of interrogatories to William Al
17	227	Filed pltfs' motion for a protective order & discovery conference w/attached affirmation of service by mail
28		The court is advised that deft Monahan withdraws motion for order compelling pltfs to respond to 1st set of interrogatories, establish discovery schedule & for fees. This withdrawal makes the matter of pltf's motion for protective & discovery conf moot. Pltfs' motion for an order determining the course of proceedings & discovery conf is adj to 10-6-86 at 4 p.m.
Aug 11	228	Filed deft Monahan's 1st set of interrogatories to Jose Mentigo

1986

Aug. 11	229	Filed deft Monahan's 1st set of interrogatories to Samuel Melvi
11	230	Filed deft Monahan's 1st set of interrogatories to Edward Menpp
11	231	Filed deft Monahan's 1st set of interrogatories to Kenneth Mall
11	232	Filed deft Monahan's 1st set of interrogatories to Gidell Marti
Oct 6		Court hears arguments of counsel re: pltfs' motion for order determining the course of proceedings & discovery conference. The matter is disposed of orally w/o specifics for the min
Nov 25	233	Filed Clarence Torry Notice to Intervene as Pltf., and affidavit
Dec 22	234	Filed Gaylord Gravitt's Motion to Intervene as Pltf & affidavit
22	235	Filed Clifford Johnson's Motion to Intervene as Pltf & Affidavit
26	236	Filed Order denying Gaylor Gravitt and Clifford Johnson's motion to intervene as pltfs w/o prejudice, as it appears that each is a member of the certified class, etc.-Elfvin, DJ (notice copy to all parties) (dkt'd 12-29-86) F-3

1987

Jan 6	237	Filedd Pltf, George Carlisle, motion to intervene as plaintiff
15	238	Filed Pltf, Milton L. Jones, motion to intervene as plaintif

1987

Jan. 29	239	Filed Pltf, James R. Moore's, motion to intervene as pltf
Feb 5	240	Filed Pltf, Laverne Barkley's, motion to invervene
5	241	Filed Pltf, Thomas Robinson's, motion to intervene
5	242	Filed pltf, Brenda R. West's, motion to intervene
5	243	Filed Pltf, Louis A. Rivera's, motion to intervene
5	244	Filed pltf, George Lewis', motion to intervene
6	245	Filed Pltf, Millicent D. Williams motion to intervene
Feb 11	246	Filed Pltf's, Sara G. Hill, motion to intervene
12	247	Filed Pltf's, Steven Jones, motion to intervene
11	248	Filed deft John Monahan's first set of interrogatories
19	249	Filed Deft's (Monahan) First set of interrogatories
19	250	Filed pltf's (Melvin Dunlap) motion to intervene
25	251	Filed pltf's (Osborne Boalds) motion to intervene
25	252	Filed pltf's (Johnny Robalo) motion to intervene
25	253	Filed pltf's (Alfred L. William) motion to intervene
27	254	Filed pltf's (Richard Campbell) motion to intervene

1987

Feb. 27	255	Filed pltf's (Gordon A. Lindenmuth) motion to intervene
Mar 9	256	Filed deft's (John Monahan) first set of interrogatories
9	257	Filed deft's (John Monahan) affirmation in opposition to Laverne Barkley's motion to intervene
16	258	Filed deft Pfeil's interrogatories and demands for document inspection
16	259	Filed deft Monahan's notice of motion for an order dismissing pltfs action agnst Monahan. RET 3/30/87.
23	260	Filed deft Monahan's affidavit
27	261	Filed pltf, Gaylord Gravitt's, affidavit withdrawing pro se status
27	262	Filed pltf, Laverne Barkley's, affidavit withdrawing motion to intervene and go pro se
27	263	Filed affidavit of James Robert Moore withdrawing pro se status
Apr 3	264	Filed order (a) that the Estate's motion to decertify the class is is denied w/o prejudice,(b) that the motions for a scheduling order are granted as noted in ¶7 of this order,(c) that the Estates' motion to compel the pltfs to answer its interrogatories is denied as moot (pltfs directed to file their answers with Clerk of Ct),(d) that the Estates' motion for fees is denied,(e) that the pltfs' motion for protective order is denied,(f) that Mancusi's motion to dismiss or to decertify the class is denied,(g) that NY's motion for a protective order is denied w/o prejudice & (h) that pltfs

1987		shall have 20 days from the filing of this Memo & Order to move for this Court's approval of proposed class notice; it is further ordered that this action be referred to Mag. Maxwell who shall schedule & oversee conferences w/attys, shall enter the scheduling order & who shall hear & determine all non-dispositive pretrial motions, etc. Elfvin,DJ. (notice & cy to all parties) (Dkt 4/3/87) F-307
Apr. 23	265	Filed order denying motions to intervene as party pltfs as each is a member of the certified class. Elfvin,DJ. (notice & cy to all parties) (dkt 4/24/87) F-307
27	266	Filed pltf's notice of motion for an order directing that the proposed notice (attached) be circulated to the class. RET 5/13/87
29	267	Filed pltf's notice of motion for an order granting continuance of pltf's time to answer Deft Monahan's motion until the conclusion of pretrial discovery
May 4	268	Filed affirmation of John R. Stewart, Esq. atty for John Monahan, that deft Monahan died on april 21, 1987
12	269	Filed (supplemental) affirmation of John R. Stewart in re death of John Monahan
13	270	Filed affidavit on behalf of "Estate" in response to pltf's motion for Ct approval of proposed form of notice to the class append to the motion
12		Ct commences hearing re: deft Monahan's motion to dismiss & the matter is declared moot by the ct as deft Monahan is deceased. Hearing conts as to pltf's notice to the class. Ct hears arguments

1987		of counsel & directs parties to submit new proposed notice by 5/22/87. Counsel for deft Estate of Rockefeller advi the ct will move for summary judgment in 2 wks.
Aug 14	271	Filed deft's (Estate of N.A. Rockefeller) notice of motion for leave to file answer RET 9/14/87
14	272	Filed deft's (Estate of N.A. Rockefeller) notice of motion for summary judgment RET 9/14/87
14		RECEIVED 3 volumes of testimony in support of Statement of Facts.
13	273	Filed pltf's notice of motion for an order substituting Estate of John Monahan as party deft in the place and stead of deft, etc.
24	274	Filed affidavit of svc of notice of motion for SJ , etc served on sundry parties on 8/13/87
24	275	Filed affidavit of svc of notice of motion for leave to file answer served on sundry parties on 8/13/87
Sep 28	276	Filed affirmation of John R. Stewart, counsel for John Monahan (deceased) in opposition to motionby pltf to substitute Estate of John Monahan
Nov 23	277	Filed Michael Deutsch (one of pltf's counsel) affirmation in response to opposition to motion for substitution of deft Monahan's estate
Dec 9	278	Filed pltf's appendix in opposition to the deft Estate's motion for summary judgment
10	279	Filed affidavit of svc by mail of Reply Memorandum in support of motion for summary judgment by deft Estate of N.A. Rockefeller served on all counsel on 12/9/87

1987

Dec. 10		Recd reply memorandum in support of motion for summary judgment by deft Estate of Nelson A. Rockefeller
10		Recd testimony submitted in reply to pltfs' opposition to the motion for summary judgment of defendant Nelson A. Rockefeller Volume 4
16	280	Filed answer of deft Estates of Nelson A. Rockefeller
21	281	Filed order granting deft Estate's motion to serve & file its answer to amended complaint. Elfvin,DJ. (notice & cy to all parties) (dkt 12/22/87) F-315
22	282	Filed testimony submitted in reply to pltfs' opposition to the motion for summary judgment of defendant Nelson A. Rockefeller Volume 4
14		Ct commences hearing, hearing argument of counse re deft Estate of Rockefeller motion for leave to file answer, which is granted by ct & motion for summary, dismissing the action, which is submitted after argument

1988

Feb 2	283	Filed transcript of proceedings held before Judge Elfvin on 12/14/87
Jun 27	284	Filed order directing that (1) Class Counsel shall by July 1, 1988 cause to be mailed in the name of the Clerk of this Ct to all class members who can be identified to NOTICE TO THE PLAINTIFF CLASS and the REQUEST FOR EXCLUSION (2) Class Counsel shall cause the Notice to be published etc. (3) Class Counsel is to file w/Clerk of this Ct Affidavits of Publication, etc. Elfvin,DJ. (notice & cy to all parties) (dkt 6/27/88) F-321

1988

Jul 1	285	Filed amended order that this ct's order of of 6/27 be amended as follows: 1) the date of svc by mail of the NOTICE TO THE PLAINTIFF CLASS is changed to 7/6/88; 2) publication in NY Daily Times is substituted in the NY Post, etc. & the notice to the pltf class is changed to require the filing of any Request for Exclusion w/Clerk of Ct nlt 8/15/88. Elfvin,DJ. (notice & cy to all parties on 7/1/88) (dkt 7/5/88) F-321
Aug 9	286	Filed notice of appearance that the firms of Geoghan & Tutrone will appear on behalf of pltf Gilberto Gonzales
11	287	Filed request for exclusion by Raymond Roche of the pltf class
17	288	Filed order to revise orders of 6/27 & 7/1; that publication in USA TODAY is reduced from 4 times to 3 times & that pltfs can substitute publication in the NATL NY TIMES for publication in USA TODAY. Elfvin,DJ. (notice & cy to all parties) (dkt 8/17/88) F-323
26	289	Filed request for exclusion by Donald McCoy of the pltf class
Sep 28	290	Filed order granting deft Estate of Nelson A. Rockefeller's motion for summary judgment & dismissing amended cmplt w/respect to to it. Elfvin,DJ. (notice & cy to all parties) (dkt 9/29/88) F-324
Oct 7	291	Filed pltfs' motion for entry of final judgment under rule 54(b) as to order of summary judgment dismissing all claims agnst the Estate of Nelson Rockefeller or in the alternative for a determination under 38 §1291(b) that an interlocutory appellate review should proceed

1988

Oct. 11	292	Filed deft Estate of Nelson Rockefeller notice of motion under Rule 54(b)
20		Recd Memorandum in support of deft's mtn under Rule 54(b) & in opposition to pltfs' alternative mtn under §1292(b)
Nov 14		The matters of the pltfs' mtn per Rule 54(b) or/alt for determination under 28 USC §1292(b) & deft Estate of Rockefeller mtn per rule 54(b) are adjd to 11/16/88 at which time the matters will be heard via telephone conf call. (Interested local parties to be present in Part III courtroom)
16		Ct commences tele conf call & hears oral argument re pltfs & deft Estate of Rockefeller motions purs to rule 54(b). The matters are submitted
Nov 30	293	Filed Memorandum & Order denying pltfs' mtn for certification purs to 28 USC 1292(b); directing entry of final judgment of dismissal of all claims by all pltfs agnst the Estate of Nelson A. Rockefeller. Elfvin, DJ (notice & cy to all parties (dkt 12/1/88) F-326
Dec 1	294	Filed judgment on decision by ct. Clerk. (notice & cy to all parties) (dkt 12/1/88) F-327
14	295	Filed Pltfs' Notice of Appeal (copy mailed to Messrs. Jackson, Moot, Stenger, Maghran & Stewart and to Clerk, CCA with copy of docket entries CCA's Forms C & D mailed to Mr. Deutsch)

1989

Jan. 19		Rec'd CCA scheduling order – Record due 1-31-89

1989

Jan. 31		Original pertinent papers, copy of docket entries and Clerk's Certificate mailed to CCA
Oct. 27	296	Filed Opinion and cert.copy of Judgment of the U.S. Court of Appeals affirming the judgment of the District, with costs to be taxed against the appellants
31	297	Filed Order making the mandate of the U.S. Court of Appeals the judgment of this court.- Elfvin, DJ (notice & copy w/cy of mandate to Messrs. Deutsch, Jackson, Moot, Stenger, Maghran, Stewart & Ms. Fink) (Dkt'd 10-31-89) F-337
Nov 2		Original papers returned from CCA
Dec 11		Colloquy w. counsel re discovery, etc. & defense counsel request for time to file summary judgment mtns & setting date for trial of remaining defts. After hearing from counsel, the crt advises that an order from the crt will issue
Dec 14	298	Filed order that this case shall proceed to selection of trial jury at 9:00 a.m., 6/5/90 with swearing in of said jury & opening statements & taking of evidence to follow herewith. Elfvin DJ (not & cy Messrs Deutsch, Moot, Stenger, Maghran, & Effron & Ms. Fink) (dkt 12/15/89) F-339
Dec 18	299	Filed mtn seeking to preclude defts from filing any mtns for summary judgment and for appropriate Rule 11 Sanctions.

1990

Jan 16	300	Filed mtn for an order dismissing the case against the late Major John Monahan & for an order granting other relief, etc.

1990

Feb 26	301	Files pltfs' affirmation in response to deft Monahan's mtn to dismiss
Mar 12	302	Filed affidavit of John R. Stewart
12	303	Filed reply affidavit of Joshua J. Effron
13		Crt commences hearing re: Deft Monahan mtn to dismiss. Movant atty advised the crt of request to submit on papers. Court hears oral srgument of Class pltf's atty Fink & colloquy Re: outstanding discovery mtns. Deft Monahan'd mtn for a summary judgment held in obeyance & atty Fink is given 3 weeks to reply. Pltf atty mtn to substitute estate of Monahan as deft is submitted. Crt adjourns at 5:50 p.m.
Mar 21	304	Filed mtn of deft Vincent R. Mancusi for summary judgment dismissing the complaint against him and in the alternative for a hearing in lemine.
21	305	Filed memorandum in support of a mtn for summary judgment on behalf of Deft. Vincent R. Mancusi
23	306	Filed mtn of deft Karl Pfeil for summary judgment dismissing the cmplt against him and in the alternative for a hearing in lemine
Apr 3	—	Elizabeth M. Fink(via Tele. Conf Call NYC), irving C. Maghran & Daryl Colosi for Richard E. Moot in Part III. Crt commences hearing at 3:17 p.m. Re: pltf application for Order to Show Cause why defts Mancusi & Pfeil's mtns for summary judgment & dismissal shall not be stricken, etc. Crt hears oral argument of counsel and advises order to show cause will not be signed. Further, the Court extends the present briefing

1990		schedule Re: Defts mtn DOE summary judgment as follows: Pltf to have until 4/23/90 to file & serve ans papers. Movants to have until 5/2/90 to file & serve any replies & oral argument will be heard at 4:00 p.m., Wed., 5/9/90 instead of presently scheduled date of 5/7/90 at 4:00 p.m.
Apr 6	307	Filed pltf's answer to deft Monahan's motion for a summary judgment
6	308	Filed mtn of deft Russell G. Oswald for summary judgment dismissing complaint against him and in the alternative for a Hearing in Lemine – 2 Volumes
6	309	Filed Memorandum in support of mtn for a summary judgment on behalf of Deft. Russell G. Oswald
6	–	Received Testimony Supporting the Statement of Facts.
May 9	310	Filed pltf's opposition to motions for summary judgment w/attached exhibits.
10	311	Filed pltf Albert Victory's affid. in opposition to motions for summary judgment.
10	312	Filed pltf Jerome Rosenberg's affid. in opposition to motions for summary judgment.
10	313	Filed atty E. Fink's affid. in opposition to motions for summary judgment.
11	314	Filed stipulation & order that Moot & Sprage, attys for Mancusi, may examine records (except confidential medical records) stored at atty general's office in Buffalo, NY, etc.-Elfvin, D.J. Notice & cpys to M. McCarthy, E. Fink, R. Moot, J. Stenger, I, Maghran, J. Effron & D. Cream)(dkt 5/11/90) F-344

1990

11	315	Filed stipulation & order that M. Deutsch & E. Fink may examine all records of pltfs stored at atty general's office in Buffalo, NY., etc..-Elfvin, D.J. (notice & cpys to M. McCarthy, E. Fink, R. Moot, J. Stenger, I. Maghran, J. Effron & D. Cream) (dkt 5/11/90) F-344
May 9		Hearing held re: defts Mancusi, Peil & Oswald motions for summary judgment or in alternative for hearing "in limine"; oral argument of counsel & matters are submitted; court moves for day certain jury selection, submission of evidence 6/5/90 – 7/10/90.
21	316	Filed transcript of 5/10/90 motions for summary judgment.
31	317	Filed affirmation of Richard Moot w/exhibits in support of deft Mancusi's motion for summ. judgment.
31	318	Filed post-argument memorandum in support of motion for summ. judg. on behalf of deft Mancusi.
Jun 15	319	Filed Order directing pltfs'to supply affid. n/l/t 7/2/90 with infor as to the existence of a representative for Mr. Monahan's estate; further, failing such submission, motion to substitute shall be denied & motion to dismiss complaint as to Mr. Monahan shall be granted.-Elfvin, DJ (notice & cpys to Ms. Fink, Messrs McCarthy, Stenger, Effron, Moot, Maghran, and Cream) (dkt 6/15/90) F-345
26	320	Filed order dismissing 3rd section of amended cmplt as to Oswald & Mancusi, but that these dfts' motions for summ judgment along w/dft Pfeil's motion are otherwise denied.-Elfvin, DJ

1990		(notice & cpy to Ms. Fink & Messrs McCarthy, Stenger, Effron, Deutsch, Moot, Maghran & Berens) (dk 6/27/90) F-345
July 2	321	Filed Deft Mancusi's notice of appeal from order of 6-26-90 (copy mailed to Ms. Fink, Messrs. McCarthy, Stenger, Effron, Deutsch, Maghran, Berens, Cunningham, Mr. Rosenberg & Mr. Blyden and to Clerk, CCA with copy of docket entries; CCA's Forms C & D mailed to Mr. Moot)
3	322	Filed Deft Pfeil's notice of appeal from order of 6-26-90 (copy mailed to Ms. Fink, Messrs. McCarthy, Stenger, Effron, Deutsch Moot, Berens, Cunningham, Mr. Rosenberg, Mr. Blyden and to Clerk, CCA with copy of docket entries; CCA's Forms C & D given to Mr. Maghran)
3	323	Filed Deft Oswald's notice of appeal from order of 6-26-90 (copy mailed to Ms. Fink, Messrs. McCarthy, Effron, Deutsch, Moot, Maghran, Berens, Cunningham, Mr. Rosenberg, Mr. Blyden and to Clerk, CCA with copy of docket entries; CCA's Forms C & D given to Mr. Stenger)
3	324	Filed dft Mancusi's mtn to certify a controlling question of law pur to Title 28 §1292(b) & for a stay. rtrn 7/10/90 @ 4:00 pm
3	325	Filed Order to Show Cause – 7/5/90 @ 5:00
10	326	Filed Supplemental Affirmation in Support of Pltf's Mtn to Substitute
9	327	Filed Telephone conference transcript held on 4/3/90
10	328	Filed Order rescheduling trial to 8/7/90, etc.-Elfvin, DJ (notice & cpy to Ms. Fink, Messrs McCarthy, Stenger, Effron, Deutsch, Moot

1990

		Cunningham, Maghran, Berens & pltf Rosenberg & Blyden) (dkt 7/11/90) F-346
10	329	Filed Order denying as moot Dft Mancusi's mtn for stay, etc.-Elfvin, DJ (notic & cy to Ms. Fink, Messrs McCarthy, Stenger, Effron, Deutsch, Moot, Cunningham, Maghran, Berens & pltf Rosenberg & Blyden) (dkt 7/11/90) F-346
Jul 3		Crt commences hearing re: dft Oswald's mtn for stay & OTSC; crt crt files OTSC requiring pltfs to show cause at 5:00 on 7/5/90 why trial of this action should not be stayed pending appeal of mtn & order entered 6/26/90.
5		Crt commences hearing re: dft Oswald's mtn for stay, etc; dfts Mancusi & Pfeil orally join in mtn & crt hears oral argument & grants mtn for stay; dft Mancusi's mtn to stay is denied as moot; crt to issue orders; jury selection, etc scheduled for 7/10/90 is removed from crt calendar; crt continued re: substitution of estate of dft Monihan, etc & that appeals from such decision are probable no matter which way crt rules & crt will certify due to pendency of dft's appeals.
16	330	Filed transcript for oral argument heard 3/13/90.
17	331	Filed transcript re: telephone conference of 7/5/90.
27		Rec'd CCA scheduling order — record due 8-20-90
19	332	Filed dft Monahan's Reply Affirmation
Aug 2	333	Filed Order granting pltfs' mtn that John S. Keller, Commissioner of Finance of Orange County, as Administrator of the Estate of John

1990		Monahan, Deceased, is substituted in place and stead of dft John Monahan; further it is ordered that the title of this action is changed to reflect such substitution.-Elfvin, DJ (notice & cy to M. McCarthy, E. Fink, J. Stenger, J. Effron, M. Deutsch, J. Rosenberg, H. Blyden, R. Moot, I. Maghran & D. Berens)(dkt 8/7/90) F-347
Aug. 17	334	Filed Deft Keller's notice of appeal from order of 8-2-90 (copy mailed to Ms. Fink, Messrs. McCarthy, Stenger, Deutsch, Moot, Maghran, Berens, Mr. Rosenberg, Mr. Blyden and to Clerk, CCA with copy of docket entries; CCA's Forms C & D mailed to Mr. Effron)
21	335	Filed Notice of Mtn & Mtn to Certify Controlling Question of Law pur Title 28 Section 1292(b) & for a Stay. rtrn 8/24/90.
21		Rec'd CCA's amended scheduling order — record due 9-4-90
30	336	Filed Memorandum & Order dismissing the 3rd section of the Amended Complaint as to deft. John S. Keller, (as Admin. of Estate of of John Monahan, Deceased), but the deft's summary judgment mtn is otherwise denied.-Elfvin, DJ (notice-cys to all parties) (dktd 8-30-90) F-347
Sep 4	337	Filed Order that the whole of said Order of 8/2/90 is incorporated herein by reference & as if it were fully reproduced & that there is added thereto the findings & statements set forth in preceding paragraph (refer to order).-Elfvin, DJ (notice & cpy to all parties)(dkt 9/4/90) F-348
12	338	Filed Stipulation re content of record on appeal
14	339	Filed dft John Kellers Notice of Mtn & mtn to amend order, etc. no rtrn date.

1990

Aug 22		Telephone conf. call in Part III; regarding Estate of Monahan's mtn to certify for appeal the substitution of Estate of Monahan and mtn for summ. judgment based on qualified immunity; crt hears oral argument & matters are submitted.
Sept 17		Original pertinent papers mailed to CCA
Sept 24	340	Filed Deft Keller's notice of appeal from order of 9-4-90 (copy mailed to Ms. Fink, Messrs. McCarthy, Stenger, Deutsch, Moot, Maghran, Berens, Mr. Rosenberg & Mr. Blyden and to Clerk, CCA w/cy. of docket entries; CCA's Forms C & D mailed to Mr. Effron)
24	341	Filed cert. cy. of order of the U.S. Court of Appeals dismissing the appeal (#334) from the order of 8-2-90 for failure to comply with the Civil Appeals Management Plan
Oct 29		Received CCA scheduling order — record due 11-16-90
30	342	Filed Order denying Keller's mtn for certification dated 9/10/90 as moot, etc.-Elfvin, DJ (notice & cpys to Ms. Fink, Messrs Moot McCarthy, Stenger, Deutsch, Maghran, Berens, Mr. Rosenberg & Mr. Blyden)(dkt 10/30/90) F-349
Nov 30	343	Filed cert. cy. of Order of the U.S. Court of Appeals & Stipulation stating that appellees' motion to dismiss & appellants' cross motion to file later under 1292(b) are withdrawn w/o costs or attys fees pur to Rule 42(b) FRAP

1991

Mar 6	344	Filed dft Mancusi's mtn for order directing the service & filing of pltf's pretrial statement. rtrn 3/18/91

1991

Mar. 1	345	Filed Opinion and cert.copy of Judgment of the U.S. Court of Appeals affirming in part, reversing in part and remanding to the District Court for further proceedings.
21		Crt conducts hearing re: dfts' mtn for pltfs to file pretrial statement; colloquy re: estate of dft Oswald; Atty Fink advises pltfs pretrial statement to be filed, etc.; crt advises that appellate record has been returned & mandate rcvd; crt to proceed to trial; parties to appear 5/13/91 @ 4:00 to set trial date.
25	346	Filed dft Mancusi's notice of intention to offer statement into evidence.
27	347	Filed Certificate of Service.
Apr 1	348	Filed Order directing service & filing of pltfs' pretrial statement n/l/t 5/1/91.-Elfvin (notice & cy to Ms. Fink, Messrs Moot, McCarthy, Stenger, Effron, Deutsch, Maghran, Berens & Mr. Blyden & Rosenberg)(dkt 4/9/91)
18	349	Filed Order/Consent to Change atty from Richard Moot at Moot & Sprague to Richard to Richard Moot at Damon & More nunc pro tunc 11/20/91.-Elfvin, DJ (notice & cy to Ms. Fink, Messrs Moot, McCarthy, STenger, Deutsch, Maghran, Berens, Mr. Blyden & Mr. Rosenberg)(dkt 4/29/91)
May 6	350	Filed pltfs' pre-trial statement.
13	351	Filed pltfs' notice of mtn re: access to various documents, etc. no rtrn date.
13	352	Filed mtn by pltfs' class for substitution of administrator, etc.

1991

May 13		Crt adjourned matter of setting trial date to 5/14/92.
14		Crt commences conference re: setting trial date; colloquy w/parties re: pending pre-trial matters & schedulling; Crt sets trial date & jury selection for 9/30/91.
17	353	Filed Order directing that pltfs' counsel be given access to file cabinets, etc.-Elfvin, DJ (notice & cy to Ms. Fink and Messrs McCarthy, Stenger, Effron, Deutsch, Moot, Maghran & Berens) (dkt 5/17/91)
17	354	Filed Order setting trial date for 9/30/91; pretrial statements to be filed by 7/8/91, etc.; pltfs to provide crt w/number constituting pltf class by 8/5/91, etc.; parties directed to appear in crt on 8/6/91 for final pretrial conference, etc.-Elfvin, DJ (notice & cy to Ms. Fink & Messrs McCarthy, Moot, Stenger, Effron, Deutsch, Maghran & Berens)(dk 5/17/91)
20	355	Filed dft Mancusi's suggestion of death for dft Oswald.
Jun 7	356	Filed mtn by pltf class for substitution of administrator of deceased dft Oswald. rtrn 6/24/91.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

AKIL AL-JUNDI et al, on behalf of themselves and all others similarly situated,

Plaintiffs,

-against-

THE ESTATE OF NELSON A. ROCKEFELLER, RUSSELL OSWALD, JOHN MONAHAN, VINCENT MANCUSI, and KARL PFEIL,

Defendants.

75 CIV 132 (E)

AFFIDAVIT IN OPPOSITION

STATE OF NEW YORK)
ss.:
COUNTY OF ULSTER)

ALBERT VICTORY, being duly sworn, deposes and says:

1. I am one of the plaintiffs herein and make this affidavit in opposition to the motions for summary judgment filed by Defendants Oswald, Mancusi, and Pfeil.

2. On September 13, 1971, during the assault, I was in D yard. I was in the immediate vicinity of Jerome Rosenberg, known as Jerry the Jew, heard his name being called over the loudspeaker, and saw a trooper threaten to kill him. Immediately after that, I accompanied Jerry through the gauntlet, where we were both beaten with clubs, into A yard.

3. In A yard, I saw Jerry being immediately singled out with an X being placed on back. I witnesses him being beaten

by a trooper on his ribs in the presence of a man whom I knew to be Deputy Assistant Superintendent Karl Pfeil. Shortly after that, I witnessed Jerry getting another beating in the presence of Karl Pfeil and Superintendent Vincent Mancusi who was watching from one of the catwalks. During this same period of time, I witnessed Defendants Mancusi and Pfeil watching Frank Smith, known as Big Black, being tortured while on a table, naked, with a football under his chin and shotgun shells on his body.

4. Although I was not wounded during the assault or singled out for special treatment like Jerry the Jew and Big Black, like the other prisoners who were in D yard on September 13, 1971, I was tortured and brutalized. I was beaten in the gauntlet, made to crawl naked through mud and broken glass, had all my personal property destroyed, and generally abused by both correctional personnel and state troopers.

5. At the time of the Rebellion, I had been at Attica for over a year. I was very familiar with both Warden Mancusi and Deputy Pfeil. My memory of what happened to us is as fresh today as it was then. Attica is branded in my brain—it is something that I will never forget.

6. Further affiant sayeth not.

_____

ALBERT VICTORY

Unsigned as served on May 10, 1990

Sworn to before me this
day of May, 1990

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NOTARY PUBLIC

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

AKIL AL-JUNDI, et al. on behalf of themselves and all others similarly situated,

Plaintiffs,

-against-

75 CIV 132 (E)

THE ESTATE OF NELSON A. ROCKEFELLER, RUSSELL OSWALD, JOHN MONAHAN, VINCENT MANCUSI, and KARL PFEIL,

Defendants.

AFFIDAVIT IN OPPOSITION

STATE OF NEW YORK)
ss.:
COUNTY OF SULLIVAN)

JEROME ROSENBERG, being duly sworn, deposes and says:

1. I am one of the plaintiffs herein and make this affidavit in opposition to the motions for summary judgment filed by Defendants Oswald, Mancusi, and Pfeil.

2. At the time of the Attica Rebellion and Massacre, I was well-known to all three defendants. This recognition came from the fact that while I was on death row, I gained both my college degree and a law degree from the Blackstone School of Law through a correspondence course. When former defendant Rockefeller commuted my death sentence, I was placed in general population and spent my time using my legal expertise to help others. Since I had been at Attica for some time, I had a reputation as a jailhouse lawyer with both the prisoners and the administration.

3. At all times during the negotiations, I served as a legal advisor at the table. On Friday, September 10, 1971, I was asked to examine an injunction signed by Judge Curtin *** administration from any reprisals against the prisoners. When I found that the order was not an official docum :nt because there was no seal, to make my point that it was worthless I tore the document up. The administration's response to this was to threaten me with violent harm at the time the prison rebellion would end. This threat – "When the time comes, you'll wish you were dead." – was made by Asst. Commissioner Dunbar in front of Defendant Oswald.

4. On September 13, 1971, during the assault, I was in D yard. During the gunfire, I was shot in the left knee. I heard my nickname, Jerry the Jew, being called over the loudspeaker and after the gas lifted, while I was lying there injured, a state trooper, calling me by name, threatened to kill me, but was stopped by another prisoner.

5. I then followed the crowd into A yard, hobbling through the gauntlet of police, armed with clubs, who were beating everyone who passed by them. The minute I got into A yard, I was recognized; an X was placed on my back, and I was put against a wall.

6. At that moment, I saw defendant Pfeil and a trooper. Pfeil watched while the trooper smashed his rifle butt against my torso fracturing several ribs.

7. After this beating, I saw both Pfeil and defendant Mancusi watching from above as the trooper continued to beat me. They watched as a rifle butt was smashed against the right side of my head, fracturing my skull and causing me to become unconscious. When I awoke, several minutes later, I saw both Mancusi and Pfeil watching the brutality being committed in front of them, including but not limited to the gauntlet, the torture of Frank Smith, the beatings of the people with X on their backs and other atrocities.

8. After my beating in A yard, I was once again taken through the gauntlet, beaten and placed in a cell in A block. The next day, I was taken to HBZ and was tortured again. This torture took place before both defendants Pfeil and Mancusi.

9. Further affiant sayeth not.

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JEROME ROSENBERG

Unsigned as served on May 10, 1990

Sworn to before me this
day of May, 1990

_____

NOTARY PUBLIC

CIVIL RIGHTS
United States Code
Title 42

§1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

* * * * *

RULES OF CIVIL PROCEDURE
United States Code
Title 28

§2072. Rules of civil procedure

The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts and courts of appeals of the United States in civil actions, ...

* * * * * *

SUPREME COURT – JURISDICTION
United States Code
Title 28

§1254. Courts of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; . . . .

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CONSTITUTION
of the
UNITED STATES
Amendment V

Amendment V — Grand Jury Indictment for Capital Crimes; Double Jeopardy; Self-Incrimination; Due Process of Law; Just Compensation for Property

* * * * * *

No person shall be . . . deprived of life, liberty, or property, without due process of law;

* * * * * *

CONSTITUTION
of the
UNITED STATES
Amendment VIII

Amendment VIII — Excessive Bail, Fines, Punishments

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

FEDERAL RULES OF CIVIL PROCEDURE
Rule 1

Rule 1. Scope of Rules

These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity, with the exceptions stated in Rule 81. They shall be construed to secure the just, speedy, and inexpensive determination of every action.

FEDERAL RULES OF CIVIL PROCEDURE
Rule 41

Rule 41. Dismissal of Actions

(b) Involuntary Dismissal: Effect Thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant . . . .

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